

HISTORICISM, PROGRESS, AND THE REDEMPTIVE CONSTITUTION

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From what are phenomena rescued? Not just or not so much from the ill-repute and contempt into which they've fallen, but from the catastrophe when a certain form of transmission often presents them in terms of their "value as heritage"—they are rescued by exhibiting the discontinuity that exists within them. There is a kind of transmission that is a catastrophe.
—Walter Benjamin**

It is frequently said that there is a necessary relationship between constitutionalism and history. As Stephen Griffin has written, "[c]onstitutional interpretation is always backward-looking . . . It draws on the past in order to provide legal authority to the present. Even as it abstracts from historical context, then, constitutional interpretation is dependent on it for its status as law."¹ To say this is to make two

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** Walter Benjamin, *N [Re the Theory of Knowledge: Theory of Progress]*, in BENJAMIN: PHILOSOPHY, HISTORY, AESTHETICS 43, 63 (Leigh Hafrey & Richard Sieburth trans. & Gary Smith ed., 1983).

¹ Stephen M. Griffin, *Constitutional Theory Transformed*, 108 YALE L.J. 2115, 2129 (1999); see also BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 34 (1991) ("[T]he Constitution is more than an idea. It is an evolving historical practice, constituted by generations of Americans as they mobilized, argued, resolved their ongoing disputes over the nation's identity and destiny."); William M. Wiecek, *Clio as Hostage: The United States Supreme Court and the Uses of History*, 24 CAL. W. L. REV. 227, 268 (1988) ("History is often intrinsic to constitutional adjudication, providing the initial assumptions, the thought structure, the terms of discourse, the backdrop of human experience, or all of these, for many instances of constitutional adjudication."). Other commentators point out that not just constitutional law, but law as a whole, is fundamentally backward-looking. See, e.g., PAUL W. KAHN, *THE CULTURAL STUDY OF LAW* 43 (1999) (contending that the "historicity of law is its single most prominent feature"); Robert W. Gordon, *Foreword: The Arrival of Critical Historicism*, 49 STAN. L. REV. 1023, 1023 (1997). Gordon writes:

For lawyers the past is primarily a source of authority—if we interpret it correctly, it will tell us how to conduct ourselves now. History is not only a source of authority but of legitimacy: It reassures us that what we do now flows continuously out of our past, out of precedents, traditions, fidelity to statutory and Constitutional texts and

related claims. The first one is that constitutions have an ineluctable relationship to history, because they arrive to us from the past.² The second one is that constitutions always face a question of legitimacy that is also a question of history: How can this text from the past have legitimacy and authority over the people today?³ One foundational question of constitutional interpretation, then, is: How can we provide an account of constitutional meaning that reconciles the historicity of the Constitution with its present day legitimacy?

Accepting that we must think historically if we want to think constitutionally, and that we must, when thinking historically, also account for the present day legitimacy of the Constitution, what kind of history should we practice? This Article is concerned with constitutional historiography, which is to say, the question of how theorists, lawyers, and judges elaborate the past in constitutional context. How ought we conceive of and investigate constitutional history and the backward-looking development of meaning that U.S. constitutionalism is based upon?

To explore these questions, this Article draws upon the writings of the Frankfurt School theorist Walter Benjamin, who thought a great deal

meanings.

Id. One can also look to doctrine to support this claim, since much of what judges and Justices do when they disagree about the Constitution is disagree about history. See William E. Nelson, *History and Neutrality in Constitutional Adjudication*, 72 VA. L. REV. 1237 (1987) ("The United States Supreme Court has long understood that the task of constitutional analysis requires historical research to discover the meaning imparted to constitutional provisions by those who enacted them."). To offer just a few out of many possible examples of cases that turn on approaches to the constitutional past, consider *Lee v. Weisman*, 505 U.S. 577, 631 (1992); *New York v. United States*, 505 U.S. 144, 163-66 (1992) (separation of powers); and *Harmelin v. Michigan*, 501 U.S. 957, 962-75 (1991) (Eighth Amendment). See also LAURA KALMAN, *THE STRANGE CAREER OF LEGAL LIBERALISM* 69-70 (1996) (discussing the use of history in the Warren Court's jurisprudence).

² See Gordon, *supra* note 1, at 1026 ("Every legal text is a historical artifact that must be brought into the present in order to be applied."). The importance of the past to contemporary meaning, and particularly linguistic meaning, is discussed in Part I, *infra*.

³ As Jed Rubenfeld puts the problem, "[d]emocratic freedom is conceived essentially as governance by the will of the actual people of the here and the now. As a result, a text that resists this present will becomes a deviance, a democratic scandal, a problem forever demanding and forever escaping explanation." JED RUBENFELD, *FREEDOM AND TIME* 11 (2001). The question of how the Constitution's democratic aspect and its historical aspect can be reconciled has been one of the most generative and important questions for constitutional theorists in recent decades. It also underpins many recent major works in constitutional law. For example, Rubenfeld's theory of paradigm cases is an effort to answer it, see *supra*, as is Ackerman's theory of the dualist constitution, see ACKERMAN, *supra* note 1, at 3-33. This same question is at the root of Alexander Bickel's articulation of the "countermajoritarian difficulty," which Bickel defines as the fact that judicial review can "thwart[] the will of representatives of the actual people of the here and now." See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 17 (1962). The question of judicial review and the question of constitutionalism can in principle be separated, of course, but they are emphatically run together in contemporary American constitutional discourse. The judge becomes the bearer of the Constitution's historical aspect, its ability to connect articulations in the past with the circumstances of the present.

about the concept of history, but little, if at all, about constitutionalism. By exploring Benjamin's concept of history, and his understanding of the three different methodological approaches to history that he postulates—historicism, progressivism, and redemptivism—I hope to make more visible some of the ways that we think about constitutional history, and some of the effects that these modalities have on our present day constitutional order. My project here is to add to our understanding of constitutional practices, and to make visible the dangers of the most common methodologies through which constitutional thinkers approach the past. One central supposition of this Article—one that I will defend throughout its course—is that our view of history strongly influences our ability to understand and react to the needs of the present.

Benjamin's concept of history is rooted in a categorical distinction between that which is "past" and that which is "historical." The past is all that has happened before. History, in contrast, is an interpretive act, or a kind of language, one in which we make meaning by juxtaposing moments of the past and present. Benjamin argues that we create history in relation to the past in the same way that we create constellations out of stars. The past is an "index"; it is the stuff of history, but it does not resemble it.

This underlying concept of history grounds Benjamin's attempt to define and criticize what he understood to be the two dominant approaches towards history at the time he was writing: historicism and progressivism. The historicist methodology seeks to understand each moment in the past objectively, on its own terms, and write authoritative histories by relying upon official sources. Benjamin has two main criticisms of historicism. He contends, first, that it is not possible to know history scientifically, without influence from the present, or objectively, through the mere accumulation of facts. For Benjamin, history is always an act of construction, and no single or final answer can be given to any truly historical question. What we make of the past depends upon the interest that we take in it—an interest that is inevitably driven by the needs of today. Benjamin's second objection is that historicism in fact sympathizes with those he called the "victors" of history, and abandons most of the past (such as the past that has not been codified in official documents) as irrelevant. Historicism thus generates histories that claim neutrality but in fact justify the status quo.

Benjamin is equally critical, however, of progressives: those who see the flaws of historicism and conclude that they ought to train their gaze on the future rather than the past. The progressive view of history, which Benjamin associated primarily with the Social Democratic Party in Germany between the World Wars, portrays history as a process of continual and inevitable improvement. Progressivism adopts a soft

focus, always privileging a narrative of improvement over elements of the past or present that disrupt this view. Benjamin rejects progressivism for two reasons. First, cutting ourselves off from the past threatens to make us complacent, because it undermines our ability to see and feel danger in both the past and present. Second, if we insist that the past is truly transcended, we blind ourselves to historical forces that continue to shape the present, and consequently we will fail to understand these forces when we meet them again in a different guise.

Benjamin thinks that another relation to the past is possible, one governed by the faithless practice of redemption, rather than a faith-based embrace of tradition or progress. Imagine sundering the act of history from the concept of time as a progression, or the past as a *sui generis* authority: that is Benjamin's challenge to us. View the present not as a moment on a timeline, but rather as a moment of agency and possibility. There is no continuum of time, Benjamin insists; there is only an eternal present, and, within that, historical acts that coalesce now and then to render visible historical forces and contemporary dangers and possibilities. Although we commonly associate the notion of redemption with a duty to the past, and the desire to make the broken whole again, this is not the driving force of Benjamin's theory of redemption. Benjamin is concerned primarily for the living, for our ability to act and experience today. It is through a relation to the past that we experience emotions like happiness or anger that drive us to act in the present. We should engage in redemptive acts not because we can make the past whole—for we cannot—but because this is the best way to make visible the forces that continue to produce injustice today, and motivate us to change them.

What does all of this have to do with the U.S. Constitution? I contend that the two approaches towards the past that Benjamin criticizes, historicism and progressivism, dominate contemporary U.S. constitutional practice and theory. Benjamin's writings can help us understand the shortcomings of these tendencies, and articulate a third possible relationship with our past, one governed not by tradition or progress, but by redemption. These modes of constitutional history⁴ can be differentiated along three axes: temporality, agency, and legitimacy.

Constitutional historicism is preoccupied with returning to the past. Its privileged location of constitutional agency is in the people and events that came before us. Its paradigmatic act of authority is one of fidelity to meanings developed or agreed upon in the past. This mode of history reconciles the historicity and present day legitimacy of the

⁴ I call these "modes of history" to try to avoid the temptation to fully personify them, or ascribe to them strict methodological boundaries. Although some theorists might be described as "historicist," "progressive," and "redemptive," many theorists will make claims that sound in one or more modes at different times, or that hover at the edges of one or more of these ideal types.

Constitution with reference to notions of consent or majoritarian tradition. We the People now ought to be governed by We the People then because the greater number of us agreed to meanings to which we must now be held, or abided by traditions that indelibly define who we are as a People. The historicist Constitution claims to be legitimate because it is Our Will or Our Tradition. An interpretation of that will or tradition is legitimate because it can be certain. It must discover, and ensure that we do not stray from, what has been.

Progressivism describes another tendency of contemporary constitutional history, one that is preoccupied not with the past but with the future. It locates agency in the movement of history itself, and posits that history will be guided in the direction of a brighter, more free, and more equal future by the processes established by our Constitution. The progressive Constitution is legitimate because it can always improve itself, and because nothing in its history or text seriously compromises that possibility. We the People now ought to abide by it not because it offers us a link to tradition or consent, but because it is a vehicle for progress. Progressivism views the constitutional past as a rising rather than fixed star. History, here, is a story of linear or spiral advance, and the present is always, on average, more free than the past. Progressive narratives do not view the failures of our historical Constitution as evidence that the document is or ever was "evil."⁵ Instead, they distance themselves from these failures, insisting that our past mistakes can truly be surpassed, and that the document will slowly but steadily work itself pure.

Redemptive constitutionalism is occupied with the time of the present, or as Benjamin would call it, the *Jetztzeit*.⁶ Its privileged locus of constitutional agency and authority is the present. It adopts a critical stance towards history, seeking to uncover discontinuities within historical narratives. Redemptive narratives use history not firmly to bound constitutional interpretation, but openly to rewrite history, and insist upon the continual need to do so. Redemptivist thought turns to history as a mode of meaning-making, one that takes its impetus from the present, but remains faithful to the facticity of the past, that is, to its capacity to serve as a secret index of meaning. Redemptivists are concerned with constitutional paths not taken, with the necessity of constitutional "countermemory,"⁷ and with radically expanding the range of constitutional sources that are permitted to contribute to our

⁵ I take the term from Jack Balkin's discussion of "constitutional evil," in his article *Agreements with Hell and Other Objects of Our Faith*, 65 FORDHAM L. REV. 1703, 1706 (1997).

⁶ I elaborate on Benjamin's use of this term in Part IV, *infra*.

⁷ Norman W. Spaulding, *Constitution as Countermonument: Federalism, Reconstruction, and the Problem of Collective Memory*, 103 COLUM. L. REV. 1992 (2003). Spaulding's notion of countermemory is discussed further in Part IV, *infra*.

understanding of the present. Rather than attribute authority to past legislators or majorities, they understand authority and legitimacy as fundamentally contemporary phenomena, properties that must always be created and recreated, and that can be disrupted or consolidated through the construction of redemptive constitutional images. They are possessed with the importance of remembering constitutional tragedies, and of resisting our strong desire to repress or forget the injustices and failures of our past. The redemptive Constitution reconciles the text's historical aspect with its present day legitimacy not by claiming that the past is fixed and can be returned to, or by claiming that it is dead and can be left behind, but rather, by claiming that it can be redeemed; that we can use the past to better understand the present, to break apart traditional narratives that blind us to possibilities of both transcendence and disaster.

Benjamin's theory of history offers several profound criticisms of constitutional progressivism and historicism. Both of these modes, he suggests, are in the grip of a false view of history. Historicists assume that the historical act has value because it can produce certainty and authority, but they are wrong that historical interpretations can either be final or carry their own authority. Progressives are wrong to hypostatize their belief in mankind's eternal advance, and to disavow anything that does not fit this preordained vision. The consequences of these errors, Benjamin insists, are grave: Both the historicist and progressive modes of thought serve to anesthetize the present. They do so by assigning constitutional agency to some other time, and constructing narratives of heritage or progress that suppress the conflict and dissension in the past and today.

A redemptive mode of history, Benjamin asserts, is based in a more sound understanding of the nature of the historical act. It is also more responsive to the needs of the present. It offers critical powers of perception that enable us to see the dangers or possibilities of the moment, and to question the historical narratives that have been handed down as authoritative. It also offers an account of how we can engage the past, respecting its facticity without turning our agency over to it. From the past we can take meaning and motivation, and a power to imagine and reimagine the forces that occupy the present.

Part I of the Article elaborates upon Benjamin's theory of history, and the categorical difference he draws between past facts and the histories that interpret them. Part II discusses his criticisms of historicism, and relates these to the dominant methodology of constitutional history today, constitutional historicism. Part III explains Benjamin's critique of the concept of progress, and applies this critique to a second tendency in current constitutional thought, constitutional progressivism. Part IV articulates the concept of constitutional

redemptivism, which offers us a way to understand our constitutional past as something other than tradition that must be carried forward, or as irrelevant because already overcome. Part V evaluates the dangers and capacities of these three approaches to history, and concludes that the redemptive approach to constitutional history is the most responsive to both the present and past, and is both compatible with and even necessary to constitutional interpretation today.

I. BENJAMIN'S THEORY OF HISTORY

Walter Benjamin, a writer to whom everything—including fame—seemed to come belatedly, was described by Hannah Arendt as “the most important critic of [his] time.”⁸ A German Jew born in 1892, Benjamin did most of his writing between the World Wars, and the era in which he lived was central to his thought. Paradoxically, the event that gives the most relevant context for Benjamin’s life and writings may be his tragic death: In 1940, forced to flee the Nazis, who had confiscated his Paris apartment and manuscripts, Benjamin tried to cross the Franco-Spanish border on foot but was denied entry into Spain.⁹ Certain that he would be returned to France and sent to a death camp, in despair, Benjamin took his own life.¹⁰ According to Arendt, had Benjamin traveled one day earlier or later, he would have successfully crossed the border: “Only on that particular day was the catastrophe possible.”¹¹

Benjamin was an essayist and thinker whose writings resist easy categorization. He thought of himself first and foremost as a literary critic,¹² but he was closely affiliated with the historical materialists of the Frankfurt School, the most well-known member of which is probably Benjamin’s disciple, Theodor Adorno.¹³ Benjamin’s writings have been the object of intense recent interest within contemporary literary and cultural studies, but for this Article, it is his concept of history that is of moment, because it provides insight into current modes

⁸ Hannah Arendt, *Introduction to Walter Benjamin: 1892-1940*, in WALTER BENJAMIN, *ILLUMINATIONS* 1, 14 (Harry Zohn trans. & Hannah Arendt ed., 1968) [hereinafter *ILLUMINATIONS*].

⁹ *Id.* at 18.

¹⁰ *Id.* Benjamin’s brother, Georg Benjamin, was in almost uninterrupted police detention from 1933, and was eventually sent to the Mauthausen death camp, where he died in 1942. See Anson Rabinbach, *Introduction to THE CORRESPONDENCE OF WALTER BENJAMIN AND GERSHOM SCHOLEM, 1932-1940* xxxiii (Gary Smith & Andre Lefevre trans. & Gershom Scholem ed., 1989).

¹¹ Arendt, *supra* note 8, at 18.

¹² *Id.* at 4.

¹³ *Id.* at 2.

of constitutional historiography that share much in common with the objects of his critique.

Benjamin's most sustained meditation on history was his famous "Theses on the Philosophy of History",¹⁴ fifteen pages written in 1940 in response to the Hitler-Stalin pact.¹⁵ It is perhaps remarkable that Benjamin responded to the march of Fascism with an essay on history, but this is in fact quite revealing: For Benjamin, only the correct approach to history would allow his contemporaries to see and react to the danger of the moment in which they were living.

As Arendt understood, for Benjamin, the "question of the past and of tradition was decisive."¹⁶ At the center of Benjamin's concept of history is an insistence on a rigorous distinction between that which is "past" and that which is "historical." For Benjamin, the past must be understood as comprised of *every* event, without differentiation between "major and minor."¹⁷ The true historian understands, therefore, that "nothing that has ever happened should be regarded as lost for history."¹⁸ The past thus resembles the Freudian unconscious: it constitutes an archive of everything that has ever happened, large and small, and can be accessed from or emerge into the consciousness of the present, but can never in human time or mind be made conscious in all of its fullness. Benjamin's convictions are influenced by his readings of Freud and Proust on the unconscious and memory: for both writers, according to Benjamin, experience, especially traumatic experience, happens retrospectively, when an event is integrated into consciousness, rather than in the moment, when it either passes us by or overwhelms us.¹⁹ Benjamin asserts that there is no such thing as an immediate experience of an object or event. He quotes the Eighteenth Century economist Turgot: "By the time we have come to discover that things are at a given juncture, they have already changed several times. Hence

¹⁴ Walter Benjamin, *Theses on the Philosophy of History*, in ILLUMINATIONS, *supra* note 8, at 253. The German title, "*Über den Begriff der Geschichte*," might be better translated as "On the Concept of History," or even (playing on the fact that *Begriff*, or "concept," derives from the word *greifen*, to grasp) as "Grasping History." This last version would best capture what I will argue is the most central aspect of Benjamin's concept of history: the notion that it must be actively grasped in the present, rather than simply perceived or discovered.

¹⁵ See Gershom Scholem, *Walter Benjamin and His Angel*, in ON WALTER BENJAMIN 51, 81-82 (Gary Smith ed., 1988).

¹⁶ Arendt, *supra* note 8, at 37.

¹⁷ Walter Benjamin, *Theses on the Philosophy of History*, in ILLUMINATIONS, *supra* note 8, at 254.

¹⁸ *Id.*

¹⁹ See Walter Benjamin, *A Berlin Chronicle*, in ONE WAY STREET 293, 343 (Edmund Jephcott & Kingsley Shorter trans., 1979) ("It is to this immolation of our deepest self in shock that our memory owes its most indelible images.") [hereinafter ONE WAY STREET]; see also WALTER BENJAMIN, CHARLES BAUDELAIRE 113-16 (Harry Zohn trans., 1997) (discussing the work of both Proust and Freud); Susan Sontag, *Introduction* to ONE WAY STREET, *supra*, at 6, 12 (noting that Benjamin translated some of Proust's works).

we always perceive events too late and politics must always foresee, as it were, the present.”²⁰ The same could be said of history.

The past, in Benjamin’s thought, has no fixed relation to time—his conception of the past thus again reveals its similarity to the Freudian unconscious. It is to be understood not as a linear and temporal progression, but as an index: “The past carries with it a [secret] index by which it is referred to redemption.”²¹ By “index” Benjamin means not an ordered archive, but, drawing from the Latin, “an informer, sign, inscription.”²² The past is a disordered series of signs or inscriptions in which we can find meaning, which point us towards something but which are not themselves the things that we seek, or the objects in which we will find meaning.

To speak historically is therefore not to recite the past, or compile it, or articulate causal relationships between one past event and another. Benjamin writes:

No fact that is a cause is for that very reason historical. It became historical posthumously, as it were, through events that may be separated from it by thousands of years. A historian who takes this as his point of departure stops telling the sequence of events like the beads of a rosary.²³

Benjamin’s claim is precise: he does not contend that there are not events that actually occurred in the past, or that no events are actually “causes” of others. He insists instead that to recite past events as if they are related through time or cause is not to articulate them “historically.” To think historically, one must bring together past and present with reference not to their place in time or causal connections, but instead in their capacity to mean and make sense, to be citable and recognizable as a concern of today:

The true picture of the past flits by. The past can be seized only as an image which flashes up at the instant when it can be recognized and is never seen again. . . . For every image of the past that is not recognized by the present as one of its own concerns threatens to disappear irretrievably.²⁴

²⁰ Walter Benjamin, *N [Re the Theory of Knowledge; Theory of Progress]*, in BENJAMIN: PHILOSOPHY, HISTORY, AESTHETICS 43, 70 (Leigh Hafrey & Richard Sieburth trans. & Gary Smith ed., 1983) [hereinafter BENJAMIN].

²¹ Walter Benjamin, *Theses on the Philosophy of History*, in ILLUMINATIONS, *supra* note 8, at 254. The words in brackets are my modification of Harry Zohn’s translations. I will use them to denote this throughout the article. For a discussion of some of the problems with Zohn’s translation, see Lloyd Spencer, *On Certain Difficulties with the Translation of On the Concept of History*, available at <http://www.tasc.ac.uk/depart/media/staff/lis/WBenjamin/TranslWB.html>.

²² OXFORD ENGLISH DICTIONARY (2d ed. 1989).

²³ Walter Benjamin, *Theses on the Philosophy of History*, in ILLUMINATIONS, *supra* note 8, at 263.

²⁴ *Id.* at 255.

We create historical meaning by bringing past events together in a constructive and interpretive act. Historical meaning is not discovered, but made, in a creative articulation that brings past events together with present circumstances in order to make meaning through their relation, thereby making the past relevant to the present. The past therefore only becomes historical "posthumously."

The true historian, Benjamin says, constructs "constellations" out of past events: he "grasps the constellation which his own era has formed with a definite earlier one."²⁵ The image of the constellation is key to Benjamin's concept of history, and it is worth taking a moment to consider it. Stars in a constellation do not relate through rubrics of age or distance; they are instead given meaning by the images we create with reference to their points. It is our perspective on the stars, not their absolute relation to one another, that is relevant to the images we make of them. Further, individual stars in a constellation do not foreordain or often even approximate the image that the constellation will take, and it is never clear what constellation will emerge from each new effort to read the stars. This image of the constellation also foregrounds the strong distinction that Benjamin believes exists between the domain of facts and the domain of interpretation, something I will return to in Part II.

Benjamin also refers to history as a linguistic category: he writes that the place that one "happens upon" historical images is in language.²⁶ By this he means to invoke the same form of relation that the image of the constellation calls forth. As Paul de Man has written, history, for Benjamin, "pertains strictly to the order of language,"²⁷ which is to say, "history . . . [is] interlinguistic: [it] relate[s] to what in the original belongs to language, and not to meaning as an extralinguistic correlate susceptible of paraphrase and imitation."²⁸ To say that history relates to that aspect of the past that belongs to language is like noting that constellations relate to a very particular capacity of stars: their capacity to form images with one another. Constellations, in fact, describe nothing else about stars. They do not represent them so much as speak them. It is in this way that we can say that constellations do not transmit stars as objects, and that history does not transmit the

²⁵ *Id.* at 263. Note that some of the stars in the constellation, according to this quote, come from our *own* epoch—a notion that seems to disrupt the metaphor of the constellation, until we realize that Benjamin does not think that we understand the past from the "present" exactly. Rather, we construct history from the place Benjamin calls the *Jetztzeit*, or a place of actuality that understands itself as outside of the linear conception of time. I discuss Benjamin's concept of the *Jetztzeit* in detail in Part IV, *infra*.

²⁶ Walter Benjamin, *N*, in BENJAMIN, *supra* note 20, at 49.

²⁷ Paul De Man, "Conclusions" *Walter Benjamin's "The Task of the Translator," Messenger Lecture, Cornell University, March 4, 1983*, 1985 YALE FRENCH STUD. 25, 44.

²⁸ *Id.* at 36.

past as a series of events. Rather, both history and constellations express only that aspect of their objects that is susceptible to language. The sheer accumulation or recounting of the past is thus not historical, in the same way that a dictionary is not a sentence, although both are made up of words. What *is* historical is the act of drawing past and present together to enable them to say something today, to “supply a unique experience with the past.”²⁹

The central act of the historian is one of imagination, rather than recitation or excavation: it is construction, not reconstruction.³⁰ History is also, importantly, less an act of writing than an act of imagining; its result is not a narrative, but a historical image.³¹ It should now be possible to understand in more depth Benjamin’s insistence that nothing that has ever happened should be considered “lost to history,” and his enigmatic assertion that there is a “secret [engagement] between past generations and the present one. Our coming was expected on earth. Like every generation that preceded us, we have been [imparted] with a *weak* messianic power, a power to which the past has a claim. That claim cannot be settled cheaply.”³²

²⁹ Walter Benjamin, *Theses on the Philosophy of History*, in ILLUMINATIONS, *supra* note 8, at 262.

³⁰ Walter Benjamin, *N*, in BENJAMIN, *supra* note 20, at 60 (“For the materialist historian, it is important to distinguish the construction of a historical state of affairs very rigorously from what one generally calls its ‘reconstruction.’ ‘Reconstruction’ by means of empathy is one-sided. ‘Construction’ presupposes ‘destruction.’”).

³¹ *Id.* at 67 (“History breaks down into images, not into stories.”); Walter Benjamin, *Theses on the Philosophy of History*, in ILLUMINATIONS, *supra* note 8, at 255 (“The past can be seized only as an image which flashes up . . .”). According to Pierre Missac, a French scholar who knew Benjamin and wrote extensively about his work, “[o]ne cannot repeat too often that the image is one of the first and original sources of Benjamin’s mode of thought . . .” PIERRE MISSAC, WALTER BENJAMIN’S PASSAGES 110 (Sheirry Weber Nicholsen trans., 1995). By describing the historical product as an image rather than a narrative, Benjamin emphasizes the freedom and agency of both the historian and reader of history: an image is less constraining than a narrative, and always foregrounds its own need for interpretation. The German word for image that Benjamin uses is *Bild*, which, in verb form (*bilden*), means to generate or to constitute. His use of the notion of the *Bild* thus carries with it a resonance of construction rather than retelling, much the same way that, in the English, the noun “image” borrows something from the verb “to imagine.” An image also has no beginning or end, and does not impose a particular sequence or temporality of encounter upon the reader. The concept of the image thus far better approximates Benjamin’s understanding of the historical product than does the concept of the narrative. Furthermore, by picturing history as an image, rather than narrative, Benjamin emphasizes his rejection of teleological notions of time and futurity that many associate with the historical act. As Susan Sontag writes, “[t]ime does not give one much leeway: it thrusts us forward from behind, blows us through the narrow funnel of the present into the future. But space [and here I would add, image] is broad, teeming with possibilities, positions, intersections, passages, detours, U-turns, dead ends, one-way streets.” Sontag, *supra* note 19, at 13. Benjamin’s reasons for his rejection of the attempt to impose a teleology upon history will become clear in Part III *infra*, when I discuss his critique of the concept of progress.

³² Walter Benjamin, *Theses on the Philosophy of History*, in ILLUMINATIONS, *supra* note 8, at 254.

What is the nature of this claim that the past has upon us? Benjamin describes it as both libidinal and linguistic:

Reflection shows us that our image of happiness is thoroughly colored by the time to which our own existence has consigned us. The kind of happiness that could inspire envy in us exists only in the air we have breathed, among people we could have talked to, women who could have given themselves to us. In other words, our vision of happiness ineluctably resonates with redemption. The image of the past with which history is concerned behaves in the same way. The past carries with it a secret index by which it is referred to redemption. Aren't we caressed by a breath of air that surrounded those before us? Don't the voices to which we lend our ears reverberate with an echo of others that have fallen silent? Don't the women that we court have sisters whom they did not get to know? If so, then there is a secret engagement between past generations and our own.³³

The claim that the past has upon us "refers us to redemption" in two ways. First, it refers us in language, in the "voices to which we lend our ears," and the dead with whom those voices resonate. Benjamin wrote extensively about language and its necessarily collective and historical qualities. Language arrives to us—or maybe more accurately, we come to language—in history, and through others.³⁴ We cannot help but invoke the past when we speak, and this is one aspect of its claim upon us. Second, the past has a claim upon us because it structures our libidinal life. Our sense of happiness, envy, hatred, and sacrifice all relate solely to the past in Benjamin's view.³⁵ Benjamin would also say, I think, that the past structures our sense of justice.

³³ Walter Benjamin, *Über den Begriff der Geschichte*, in 1 WALTER BENJAMIN, GESAMMELTE SCHRIFTEN 693, 693-94 (Rolf Tiedemann & Hermann Schweppenhäuser eds., 1977) [hereinafter GESAMMELTE SCHRIFTEN]; see also Walter Benjamin, *Theses on the Philosophy of History*, in ILLUMINATIONS, *supra* note 8, at 253-54. I have offered my own translation here, one that borrows heavily from Zohn's—in part because the German version of the "Theses" in Benjamin's *Gesammelte Schriften* includes several sentences that are not in the Zohn translation.

³⁴ That is, the domain of nomination is something that we inherit from others, rather than create or intend. As Giorgio Agamben points out, drawing upon some of Walter Benjamin's work on language, "[s]ince humans can receive names—which always precede them—only through transmission, the access to this fundamental dimension of language is mediated and conditioned by history. Speaking beings do not invent names . . ." GIORGIO AGAMBEN, POTENTIALITIES 1, 49-50 (Daniel Heller-Roazen trans. & ed., 1999). These names are what Wittgenstein called "simple signs," those elements of language that must be explained to us in order for us to understand them. *Id.* at 50. Thus "[t]he historical condition of human beings is inseparable from their condition as speaking beings; it is inscribed in the very mode of their access to language." *Id.* at 51.

³⁵ Walter Benjamin, *Theses on the Philosophy of History*, in ILLUMINATIONS, *supra* note 8, at 260 (noting that the "hatred and [the] the spirit of sacrifice . . . are nourished by the image of enslaved ancestors rather than that of liberated grandchildren").

Benjamin here offers a strictly presentist view of the past's claim upon us. He insists that we inevitably relate ourselves to the past through language, and through our libidinal life. We do not, on this account, owe the past itself anything. At moments, Benjamin espouses a more theological, less presentist view, suggesting that the living can and should seek to make previously "complete [suffering] into something incomplete,"³⁶ and save the dead.³⁷ But he is inconsistent in his theologism. His most unequivocal statements present history as utterly opposed to a theology that sees historical agency as divine rather than manmade.³⁸ But he also writes that the concept of the experience, which, as discussed above, Benjamin understood in Freudian terms,³⁹ "forbids us to conceive of history as thoroughly a-theological, even though we barely dare not attempt to write it according to literally theological concepts."⁴⁰ We can reconcile these two statements by understanding them to apply to different aspects of the concept of theology and redemption. If we *experience* things retroactively, as Benjamin believed, then there is a way in which action in the present can affect the past, insofar as it can affect that past that continues to live, in experience, today. Thus, Benjamin can argue both that we can affect the past, and that our duty and desire to do so comes from the present. But Benjamin is also insistently opposed to theological thinking where it posits a divine actor, or the prospect of complete redemption, as we will discuss further in Part III.

II. AGAINST HISTORICISM

Benjamin believed that true historical practice differed in critical ways from the two dominant approaches toward history at the time he was writing: historicism and progressivism. To understand what Benjamin meant by historicism, it helps to consider the thought of the

³⁶ Walter Benjamin, *N*, in BENJAMIN, *supra* note 20, at 61.

³⁷ Walter Benjamin, *Theses on the Philosophy of History*, in ILLUMINATIONS, *supra* note 8, at 255 ("[E]ven the dead will not be safe from the enemy if he wins.").

³⁸ Thus Benjamin wrote:

Only the messiah himself puts an end to history, in the sense that it frees, completely fulfills the relationship of history to the messianic. Therefore, nothing that is truly historical can want to relate by its own volition to the messianic. Therefore the kingdom of God is not the *telos* of the dynamics of history, it cannot be posited as its aim; seen historically it is not its aim but its end.

De Man, *supra* note 27, at 45 (quoting and translating from Benjamin's *Theological and Political Fragment*, in WALTER BENJAMIN, REFLECTIONS 312, 314 (Edmund Jephcott trans. & Peter Demetz ed., 1978) [hereinafter REFLECTIONS]).

³⁹ See *supra* text accompanying notes 19-20.

⁴⁰ Walter Benjamin, *N*, in BENJAMIN, *supra* note 20, at 61.

man that Benjamin holds forth as the chief exemplar of the movement: the renowned nineteenth century German historian Leopold von Ranke.

Commonly referred to as the founder of the modern science of history, Ranke is credited by historians with mapping a new direction for their discipline. Ranke's methodology was based upon "the critical study of [historical] sources and upon the organization of these sources into a hierarchy with its apex in the original document contemporary with the historicized event, as close as possible to the historical actor and as distant as possible from the historian."⁴¹ His written works were predominantly histories of the major European nations, because he believed that states represented "spiritual forces" through which one could observe the movement of history.⁴² In the interaction and conflict of these European states, Ranke believed, lay the secret of world history, which it was his greatest ambition to write.⁴³

The innovations wrought by Ranke's method can only be understood against the approach he sought to overthrow, the philosophical-historical tradition of German Idealism.⁴⁴ Ranke criticized Idealists for subsuming history into philosophy, and subordinating the past to their philosophical theory of progress.⁴⁵ Ranke insisted, instead, that "every epoch is immediate to God,"⁴⁶ and had to be understood on its own terms.⁴⁷ The way to do this, according to Ranke, was for the historian to devote himself solely to facts which

⁴¹ LEONARD KRIEGER, *RANKE: THE MEANING OF HISTORY* 2 (1977).

⁴² Georg G. Iggers & Konrad von Moltke, *The Idealistic Theory of the State*, in LEOPOLD VON RANKE, *THE THEORY AND PRACTICE OF HISTORY* 61, 62 (Georg G. Iggers & Konrad von Moltke eds., 1973) [hereinafter *THE THEORY AND PRACTICE OF HISTORY*].

⁴³ *Id.*

⁴⁴ Prominent German Idealists included G.W.F. Hegel and Johann Gottlieb Fichte.

⁴⁵ For example, he rejected Fichte's assertion that "[r]emaining freely within the limits of philosophy without regard for any experience, [the philosopher] must be able to *a priori* . . . describe all of time and all its possible epochs" Leopold von Ranke, *On the Character of Historical Science* (Wilma A. Iggers trans.), in *THE THEORY AND PRACTICE OF HISTORY*, *supra* note 42, at 35 (quoting Fichte).

⁴⁶ *Id.* at 53. Ranke took theological exception to the Idealist notion of progress:

If in contradiction to the view expressed here, however, one were to assume that this progress consisted in the very fact that the life of mankind reaches a higher potential in every epoch—that is, that every generation surpasses the previous one completely and that therefore the last epoch is always the preferred, the epochs preceding it being only stepping stones to ones that follow—this would be an injustice on the part of the deity.

Id. Despite this insistence, Ranke believed that the facts of history supported a narrative of "progressive world-historical movement." Ernst Schulin, *Universal History and National History, Mainly in the Lectures of Leopold von Ranke*, in LEOPOLD VON RANKE AND THE SHAPING OF THE HISTORICAL DISCIPLINE 70, 81 (Georg G. Iggers & James M. Powell eds., 1990) [hereinafter *RANKE AND SHAPING HISTORICAL DISCIPLINE*].

⁴⁷ The fact that each era was immediate before God did not mean that each ought to be of equal interest to the historian; in fact, "[n]ot unlike Hegel, [Ranke] is concerned only with periods of world historical significance. Similarly, he is interested only in the world historical peoples, which in the modern period populate the great European nations. His universal history is thus, strictly speaking, the history of Western civilization." Georg G. Iggers & Konrad von Moltke, *The Prefaces*, in *THE THEORY AND PRACTICE OF HISTORY*, *supra* note 42, at 132.

could be found in official or authoritative documents.⁴⁸ “History first begins,” he wrote,

at the point where monuments become intelligible and documentary evidence of a trustworthy character is forthcoming, but from this point onward her domain is boundless. Universal history . . . embraces the events of all times and nations, with this limitation only: that they shall be so far ascertained as to make a scientific treatment of them possible.⁴⁹

Ranke is credited with “the most famous statement in all of historiography,”⁵⁰ to which, as we will see, Benjamin refers: “To history has been given the function of judging the past, of instructing the men for the profit of future years. The present attempt does not aspire to such a lofty undertaking; it merely wants to show [what actually happened].”⁵¹ Ranke was adamant that neither the present, nor the subjectivity of the historian could be allowed to influence historical practice.⁵² His was an attempt to discern history “objectively,” which meant that the true historian sought, as Ranke did, “to extinguish [his] own self, as it were, to let the things speak and the mighty forces appear which have arisen in the course of the centuries.”⁵³

⁴⁸ Ranke wrote that “[t]rue doctrine lies in the knowledge of the facts,” and that “[s]trict presentation of the facts, conditional and unattractive though they may be, is unquestionably the supreme law, for historical research is oriented by its very nature to the particular.” KRIEGER, *supra* note 41, at 5 (internal quotation marks and citations omitted). The historian, Ranke insisted, “should be satisfied with simple information—satisfied that it merely corresponds to the object,” and be confident that history would emerge from it, because in his view, events themselves were inherently linked through causal nexuses. Ranke, *supra* note 45, at 40. Ranke also believed that history could not be practiced where such evidence was unavailable. “We are fortunate where documentary traces remain. At least these can be grasped. But what happens where there are none, for instance in prehistory? I am in favor of excluding this period from history because it contradicts the historical principle which is documentary research.” *Id.* at 45.

⁴⁹ Leopold von Ranke, *Preface to Universal History*, in *THE THEORY AND PRACTICE OF HISTORY*, *supra* note 42, at 161.

⁵⁰ KRIEGER, *supra* note 41, at 4.

⁵¹ Leopold von Ranke, *Preface to The First Edition of Histories of the Latin and Germanic Nations* (Wilma A. Iggers trans.), in *THE THEORY AND PRACTICE OF HISTORY*, *supra* note 42, at 137.

⁵² “We judge the past too often by the present situation. . . . We, who search for truth, even in error, who view every existence as permeated with original life, must above all avoid this error.” Ranke, *supra* note 45, at 41–42.

⁵³ KRIEGER, *supra* note 41, at 5 (quoting Ranke, citing Hans Herzfeld, *Vorwort*, in *RANKE, ÜBER DIE EPOCHEN DER NEUEREN GESCHICHTE* (Hans Herzfeld ed., 1917)). Ranke did not think this standard could be perfectly attained, but thought that it should be attempted. Objectivity, for Ranke, was the task that “the historian . . . must set for himself all the more since personal limitation hinders him from attaining it.” *Id.* (quoting Letter from Leopold von Ranke to King Maximilian II of Bavaria (Nov. 26, 1859), in *DAS BRIEFWERK 432* (Walter P. Fuchs ed., 1949) [hereinafter *BRIEFWERK*]). Ranke continued, “[t]he ideal of historical education would consist in training the subject to make himself wholly into the organ of the object, that is, of science (*Wissenschaft*) itself, without being hindered from knowing and presenting the complete truth by the natural or fortuitous limits of human existence.” *Id.* (quoting the same letter)

A. Benjamin's Critique of Historicism

Benjamin offers two salient criticisms of historicism: First, he contends that its model of history is philosophically indefensible. Second, he contends that historicists, despite their claim to tell the past as "as it really was," in fact tell histories that serve the "victors" of history, because they equate history with tradition and heritage, and thus, with authority.

Benjamin considers the objectivist pretenses of the historicists to be folly: "[t]o articulate the past historically does not mean to recognize it 'the way it really was.' (Ranke). It means to seize hold of a memory as it flashes up at a moment of danger."⁵⁴ From the discussion in Part I, it should be clear why Benjamin rejects the historicist view: he understands history as an image that is constructed, not discovered.⁵⁵ Thus, Benjamin writes that true history is "based on a constructive principle," rather than the "additive" principle that he associates with historicism.⁵⁶ For Benjamin, "the 'purity' of the gaze is not so much difficult but impossible to attain."⁵⁷ Note, though, that when he says that true history is constructed, Benjamin does not mean that it is "fabricated" or radically contingent. The fact that one can draw *many* meanings out of the past does not mean that one can draw *any* meaning out of the past. And as we will see in Part IV, it also does not mean that every mode of constructing the past is, for Benjamin, as good as any other.⁵⁸

For Benjamin, historicism does not just produce flawed or willful history. It also endangers the past, or more accurately, all of those moments of the past that do not count as heritage and tradition.⁵⁹ He writes:

From what are phenomena rescued? Not just or not so much from the ill-repute and contempt into which they've fallen, but from the catastrophe when a certain form of transmission often presents them

⁵⁴ Walter Benjamin, *Theses on the Philosophy of History*, in ILLUMINATIONS, *supra* note 8, at 255. He notes elsewhere, "[t]he history that showed things 'as they really were' was the strongest narcotic of the century." Walter Benjamin, *N*, in BENJAMIN, *supra* note 20, at 51.

⁵⁵ Ranke, in contrast, considered himself a kind of "Columbus" or "a kind of Cook for so many beautiful, unknown islands of world history." KRIEGER, *supra* note 41, at 11 (quoting Letter from Leopold von Ranke to Heinrich Ritter (Oct. 28, 1827), in BRIEFWERK, *supra* note 53, at 123, 126; Letter from Leopold von Ranke to Karl Varnhagen von Ense (Dec. 9, 1827), in BRIEFWERK, *supra* note 53, at 123, 126).

⁵⁶ Walter Benjamin, *Theses on the Philosophy of History*, in ILLUMINATIONS, *supra* note 8, at 262.

⁵⁷ Walter Benjamin, *N*, in BENJAMIN, *supra* note 20, at 59.

⁵⁸ The value of a particular image of history, for Benjamin, is its "actuality," not its definitiveness or authoritativeness. I undertake a full explication of this in Part IV, *infra*.

⁵⁹ "In every era," Benjamin writes, "the attempt must be made anew to wrest tradition away from a conformism that is about to overpower it." Walter Benjamin, *Theses on the Philosophy of History*, in ILLUMINATIONS, *supra* note 8, at 255.

in terms of their “value as heritage.”—They are rescued by exhibiting the discontinuity that exists within them. There is a kind of transmission (*Überlieferung*) that is catastrophe.⁶⁰

Überlieferung can mean both transmission and tradition: catastrophe is here both a transmission and a tradition; it is the transmission of the past as a tradition.

Why? Because traditions ossify the past and experience, taking away from our ability to act to change the present order. To look to the past solely for its “value as heritage,”⁶¹ Benjamin claims, is to empathize with those who dominate today.⁶² Thus, Benjamin asks rhetorically, with whom do the adherents of historicism actually empathize? He concludes:

The answer is inevitable: with the victor. And all rulers are the heirs of those who conquered before them. Hence, empathy with the victor invariably benefits the rulers. Historical materialists know what that means. Whoever has emerged victorious participates to this day in the triumphal procession in which the present rulers step over those who are lying prostrate. According to traditional practice, the spoils are carried along in the procession. They are called cultural treasures, and a historical materialist views them with cautious detachment. For without exception the cultural treasures he surveys have an origin which he cannot contemplate without horror. They owe their existence not only to the effort of the great minds and talents who have created them, but also to the anonymous toils of their contemporaries. There is no document of civilization which is not at the same time a document of barbarism. And just as such a document is not free of barbarism, barbarism taints also the manner in which it was transmitted from one owner to another.⁶³

For Benjamin, historicism empathizes, wittingly or unwittingly, with those who have dominated in the past, constructing a heritage that inevitably justifies the status quo. This claim is both descriptive and theoretical. At the descriptive level, Benjamin references the actual political leanings of the German historicists, who were famously both nationalistic and committed to demonstrating the superiority of their current states.⁶⁴ Ranke himself insisted that history itself could not

⁶⁰ Walter Benjamin, *N*, in BENJAMIN, *supra* note 20, at 63.

⁶¹ *Id.* at 67.

⁶² Walter Benjamin, *Theses on the Philosophy of History*, in ILLUMINATIONS, *supra* note 8, at 256. Empathy, although not a term we necessarily associate with history today, was an important term for historicists. Ranke, for example, “pleaded for empathy and understanding via direct inspection of the sources, and . . . occasionally argued that ideally the historian ought to extinguish his own self in order to let the events speak for themselves.” Wolfgang J. Mommsen, *Ranke and the Neo-Rankean School in Imperial Germany: State-oriented Historiography as a Stabilizing Force*, in *RANKE AND SHAPING HISTORICAL DISCIPLINE*, *supra* note 46, at 124, 137.

⁶³ Walter Benjamin, *Theses on the Philosophy of History*, in ILLUMINATIONS, *supra* note 8, at 256.

⁶⁴ Ranke himself wrote that “one does not study history only for school: the knowledge of the

"approve of the overthrow of the old, as if it were something completely dead and unusable This demolishing and changing and again demolishing is not the way of nature History, of course, recognizes the principle of movement but as evolution, not revolution."⁶⁵

Importantly, however, Benjamin did not understand the politics of historicists to be accidental or unrelated to their methodology. Instead, he thought their methodology both emerged from and strengthened their commitment to the status quo. Insofar as historicists ignored realms other than official state politics, ranked sources into a hierarchy with official documents at the top, and aspired to tell a history of "major events" and "heritage," Benjamin believed that they would inevitably do nothing more than carry the spoils of history on behalf of those who have emerged victorious.⁶⁶ By accepting a link between history and tradition, Benjamin insisted, historicists in fact served authorities in the past and those who have continued to win.⁶⁷

history of mankind ought to be the common property of mankind and, above all, should benefit the nation to which we belong and without which our studies would not even exist." Leopold von Ranke, *The Role of the Particular and the General in the Study of Universal History*, in *THE THEORY AND PRACTICE OF HISTORY*, *supra* note 42, at 57, 58-59; *see also* James M. Powell, *Introduction*, *THE THEORY AND PRACTICE OF HISTORY*, *supra* note 42, at xii, xvii ("Although [Ranke] identified objectivity with 'impartiality' (Unparteilichkeit), his focus on documents of state, which he viewed as primary sources for historical studies, involved an implicit conservative bias in favor of the existing political and social order."). As discussed above, the German historicist school that Ranke inaugurated justified the German Empire as the "noblest work of political evolution." Walter Prescott Webb, *The Historical Seminar: Its Outer Shell and Its Inner Spirit*, 42 *MISS. VALLEY HIS. REV.* 3, 7 (1955).

⁶⁵ Ranke, *supra* note 45, at 43. Of particular importance for Benjamin was likely the Neo-Rankean school of German historians who had gained prominence in Germany in the Willhelmine era, and who continued to be influential in the years in which Benjamin wrote. *See* Mommsen, *supra* note 62, at 125. Neo-Rankeans formed part of the intellectual flank of the conservative backlash against democratization in Germany, *see id.* at 128, and they turned to Ranke because his theories allowed them to project the "semi-authoritarian structure of the Bismarckian state . . . as . . . the product of objective historical forces, not just as the result of a revolution from above . . ." *Id.* at 129. Despite their claims to objectivity, the Neo-Rankeans "quite deliberately sought to create a new national identity for the German nation which was in line with given conditions in Imperial Germany." *Id.* at 130. Mommsen credits them as having some influence on the demise of the Republic. *See id.* (noting that even after the transition to democracy in 1918 these historians' "publications, which still reached a wide public, contributed to undermine the slim chances of survival for the Weimar Republic").

⁶⁶ Ranke, for example, considered the "most precious jewel" of mankind's heritage to be: those immortal works of genius in poetry and literature, in science and art, which . . . represent what is common to all mankind. With this possession are inseparably combined the memories of the events, the institutions, and the great men of the past. One generation hands on this tradition to another, which may again and again be revived and recalled to the minds of men, as I have the courage and confidence to do.

Leopold von Ranke, *Preface to Universal History*, in *THE THEORY AND PRACTICE OF HISTORY*, *supra* note 42, at 164.

⁶⁷ Walter Benjamin, *N*, in *BENJAMIN*, *supra* note 20, at 56. Benjamin wrote:

Barbarism inheres in the very concept of culture: taken as the concept of a hoard of values that is independent, not of the production process from which those values emerged, but of the process in which they survive. In this way, they serve the

As Arendt puts it, Benjamin understood that “[i]nsofar as the past has been transmitted as tradition it has authority; insofar as authority presents itself historically, it becomes tradition.”⁶⁸ It was the historicists’ emphasis on heritage and tradition, and the necessary link between these concepts and that of authority—that is, the way that authority and tradition reinforce one another—that Benjamin wanted to make visible and challenge. His question, simply put, was, why do historicists think that those things that are visible as “heritage” have the most value?⁶⁹

As Jack Balkin has noted, “the continuation of any tradition must necessarily kill off other possible lines of development, and relegate them to the margins or brand them as heretical.”⁷⁰ Benjamin knew this, and was persuaded that “tradition puts the past in order, not just chronologically but first of all systematically in that it separates the positive from the negative, the orthodox from the heretical, and [that] which is obligatory and relevant from the mass of irrelevant or merely interesting opinions and data.”⁷¹ Those who claim to look at the past “uncontaminated” by the present end up looking only at major events, taking an uncritical view of cultural heritage and traditions. They see only the genius in works that appear immortal, not the unacknowledged labor that also helped create them. Benjamin thus insists that “[t]here is no document of civilization which is not at the same time a document of barbarism.” For Benjamin, barbarism is identified with both the “anonymous toil” that contributed to such documents of civilization, and also with the mode of history that perpetuates this anonymity.

Historicism, which produces history as “tradition” and a series of “cultural treasures,”⁷² pronounces great swaths of the past to be without meaning for the present; to the historicist they are simply “trash.”⁷³ All

apotheosis of the latter, no matter how barbaric it may be.

Id.

⁶⁸ Arendt, *supra* note 8, at 38.

⁶⁹ The desire to equate tradition with virtue has the same tautological structure of the well known joke that asks why it is that one always finds things in the last place that one looks for them. If a historical practice or document does not survive it is not available to be called a tradition. There can, of course, be counter-hegemonic claims to tradition, and Benjamin spoke of wresting traditions away from conformism. See Walter Benjamin, *Theses on the Philosophy of History*, in *ILLUMINATIONS*, *supra* note 8, at 255. Here, however, he refers to hegemonic constructions of tradition.

⁷⁰ Balkin, *supra* note 5, at 1715 (citation omitted).

⁷¹ Arendt, *supra* note 8, at 44. Arendt juxtaposes the figure of the devotee of tradition with that of the dedicated collector (which Benjamin was): “Against tradition the collector pits the criterion of genuineness . . .” *Id.*; see also Sontag, *supra* note 19, at 17.

⁷² Walter Benjamin, *Theses on the Philosophy of History*, in *ILLUMINATIONS*, *supra* note 8, at 256.

⁷³ Walter Benjamin, *N*, in *BENJAMIN*, *supra* note 20, at 47 (noting that the method of his *Arcades* project was to “[o]nly exhibit . . . the trivia, the trash—which I don’t want to inventory, but simply allow to come into its own in the only way possible: by putting it to use”).

traditions are therefore *necessarily* the spoils of those who have won in the past and who continue to win today; they are narratives that connect the victors of the past and present. But Benjamin wants very much to dissociate this kind of winning, which he sees as simple domination, from true victory, in which those who win *deserve* to win. (I will discuss this further in Part III.) Historicism's focus on great events and cultural heritage robs the past of its ability to affect the present, and perpetuates the domination of those who have inherited the victories of the past, of those who have always had the power to define and transmit heritage and cultural value.

B. *Constitutional Historicism*

What can all of this tell us about constitutional history? There is a distinct kind of constitutional claim that we can usefully refer to as historicist, in the Benjaminian sense of the term.⁷⁴ Like Benjamin's historicists, constitutional historicists are preoccupied with returning to the past. They see historical inquiry as an objective and scientific process, and because of their need for certainty, they focus, like Ranke, solely on authoritative documents and major events. They insist that when properly conducted, history transmits tradition or consent, and thereby authority. But unlike Benjamin's historicists, constitutional historicists are required to justify this claim in legal terms, and reconcile it with the text's contemporary legitimacy. They do so with reference to notions of contractarianism and majoritarian tradition.⁷⁵ Constitutional historicism posits that history can provide definitive and final constitutional meanings in the present, and thereby bind us to the mast of past commitments, and lend both authority and restraint to constitutionalism, and the particular practice of judicial review.

⁷⁴ As will shortly become clear, the definition of constitutional historicism developed here differs fundamentally from the definition of historicism in the work of other scholars. See, e.g., Jack M. Balkin & Sanford Levinson, *Legal Historicism and Legal Academics: The Roles of Law Professors in the Wake of Bush v. Gore*, 90 GEO. L.J. 173, 174 (2001) (describing "legal historicism" as the view that "the conventions that determine what is a good or bad legal argument are not fixed, but change over time in response to changing social, political, and historical conditions"); Gordon, *supra* note 1, at 1028 (describing and advocating a mode of "critical historicism" that "reveals traces of . . . pasts continuing pervasively into the present"); Robert W. Gordon, *Historicism in Legal Scholarship*, 90 YALE L.J. 1017, 1017 n.1 (1981) (referring to historicism as "the perspective that the meanings of words and actions are to some degree dependent on the particular social and historical conditions in which they occur, and to interpretations and criticism that are suggested by that perspective").

⁷⁵ See Robert Post, *Theories of Constitutional Interpretation*, 30 REPRESENTATIONS 13, 21 (1990) (discussing the view that "the Constitution [is] binding in the same way that a promise is binding, as a single voluntary act of willful self-regulation").

It is clear that historicism, thus defined, plays a prominent role in constitutional thinking today. It is present in all arguments that claim to produce definitive constitutional interpretations by objectively summing up past facts, which are treated as synonymous with the intent of the Framers, the meaning of the constitutional text at the time that it was drafted, or the majoritarian and officially sanctioned traditions of the American people.

Raoul Berger, for example, argues almost exclusively in the historicist vein. A self-styled "originalist," he insists that objective historical inquiry can determine even the most complicated questions of constitutional interpretation, such as the true meaning of the Fourteenth Amendment.⁷⁶ Berger argues that we can draw such judgments solely from legislative history, i.e., authoritative texts.⁷⁷ Originalists claim that this methodology is the single best form of constitutional interpretation because it serves democracy. According to Berger, for example, originalism is "not a scholastic exercise rooted in abstraction; it serve[s] as a brake on judicial revision of legislative enactments."⁷⁸ This view relies fundamentally on the conceit of consent. Another originalist, former Attorney General Edwin Meese III, put it this way: "A Jurisprudence of Original Intention . . . reflects a deeply rooted commitment to the idea of democracy The Constitution is the fundamental will of the people; that is why it is the fundamental law."⁷⁹ The historicist Constitution is presented as a legitimate constraint upon contemporary subjects because "the People" agreed to it in the past, and we are they.⁸⁰ Precisely *how* we are they is, as a rule, unspecified.

⁷⁶ See Raoul Berger, *Jack Rakove's Rendition of Original Meaning*, 72 IND. L.J. 619, 632 (1997) (rejecting Rakove's view of the intentions of the framers of the Fourteenth Amendment); Raoul Berger, *Reflections on Constitutional Interpretation*, 1997 B.Y.U. L. REV. 517, 528 (rejecting Eric Foner's argument about the meaning of the same Amendment) [hereinafter Berger, *Reflections*].

⁷⁷ Berger, *Reflections*, *supra* note 76, at 533 (drawing upon legislative history of the Fourteenth Amendment to conclude that "'Equal Protection' merely restated in positive terms the Civil Rights Act's negative that 'there shall be no discrimination' with respect to the enumerated categories"). For a competing claim on this point, see H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985) (arguing that the original intentionalism did not mean the same the same thing to earlier proponents of the practice as it does to contemporary proponents such as Berger).

⁷⁸ Berger, *Reflections*, *supra* note 76, at 526.

⁷⁹ Speech of Attorney General Edwin Meese III to the American Bar Association, Washington D.C. (July 9, 1985), in *THE GREAT DEBATE: INTERPRETING OUR WRITTEN CONSTITUTION* 9 (Federalist Soc'y ed., 1986). Similar claims can be found in the writings of other constitutional historicists. So, for example, Robert Bork insists that "[t]he original Constitution was devoted primarily to mechanisms of democratic choice," and objects that "[c]onstitutional scholarship today is dominated by the creation of arguments that will encourage judges to thwart democratic choice." ROBERT H. BORK, *TRADITION AND MORALITY IN CONSTITUTIONAL LAW* 9 (1984).

⁸⁰ So, for example, Michael McConnell writes that "[c]onstitutional text was formally adopted by a supermajority of the people, and deserves respect for that reason." Michael W. McConnell, *The Right to Die and the Jurisprudence of Tradition*, 1997 UTAH L. REV. 665, 682.

Current majorities and judges are bound by past supermajorities because sometime in the past, "the people" consented to something precise, something specific, something knowable. We might call this contractarian historicism.

Textualism, as that term is usually employed, is another contractarian mode of historicism. Justice Antonin Scalia, a professed textualist, contends that history is objectively determinable and provides the best strategy to assign fixed meaning to constitutional texts. He concedes that although "it is often exceedingly difficult to plumb the original understanding of an ancient text," we can do it if we "somehow plac[e] out of mind knowledge that we have which an earlier age did not, and put[] on beliefs, attitudes, philosophies, prejudices and loyalties that are not those of our day."⁸¹ And although we might not have cause to be confident that lawyers will get the "correct historical answer," Scalia insists, that is not because the historical act is indeterminate. Rather, "for the vast majority of questions the [historical] answer is clear."⁸² Despite his suspicion that judges have neither the time nor the training to engage in rigorous historical inquiry, Justice Scalia defends the interpretive mode of originalism as a limitation upon judicial overreaching: "the main danger in judicial interpretation of the Constitution . . . is that the judges will mistake their own predilections for the law. . . . Originalism does not aggravate the principal weakness of the system, for it establishes a historical criterion that is conceptually quite separate from the preferences of the judge himself."⁸³

Two less common forms of historicism also bear mentioning. One is traditionalism, which seeks constitutional guidance from tradition. Tradition here is defined as the historical "status quo," or what "our society" has believed over time.⁸⁴ Some traditionalists argue in the contractualist mode, looking to tradition to find evidence of the intent of the Framers.⁸⁵ Others are similarly intentionalist, but more general in the will that they seek to uncover. They perceive in tradition a past and often tacit "common consent" that ought to bind us today.⁸⁶ Other traditionalists insist that adherence to tradition is an obligation we have

⁸¹ Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CINN. L. REV. 849, 856-57 (1989). At times, Scalia notes that he would not apply historicist arguments, and perhaps no judge would employ this methodology universally. See *id.* at 861 (noting that in some cases originalism "is medicine that seems too strong to follow," and that he himself would not use it in a case about the constitutionality of branding or public lashing).

⁸² *Id.* at 863.

⁸³ *Id.* at 863-64.

⁸⁴ For a thorough and illuminating discussion of the traditionalist mode of constitutional argument, see Rebecca Brown, *Tradition and Insight*, 103 YALE L.J. 177 (1993). Brown defines tradition as "what a society believes (or professes to believe) with respect to its values and aspirations for itself." *Id.* at 182.

⁸⁵ For a discussion of cases and theorists that argue in this vein, see *id.* at 183-91.

⁸⁶ *Id.* at 191.

to prior generations.⁸⁷ All of these modes of traditionalism share the qualities of historicism as described above: they look to the past for clear rules and customs that we can bind ourselves to in the present, and ascribe to the past its own *sui generis* authority.

The most modest form of historicism concedes that many historical questions about our Constitution cannot be definitively answered, but insists that some can, and that where they can, the answers ought to be granted present day authority. William Nelson offers an excellent account of this sort of argument, which he calls “descriptivist.” The fundamental assumption of descriptivism, according to Nelson, is that “good history can accurately portray past reality.”⁸⁸ The historical act is, for the descriptivist, an act of summation. And we can be descriptivists even if we concede that most historical questions cannot be decisively answered.⁸⁹ We simply give authority to such arguments wherever context is not a problem.⁹⁰

So influential is historicism in our constitutional order that even the staunchest critics of historicism often make claims that sound in the historicist register. Cass Sunstein, for example, calls his mode of interpretation “soft originalism,” because it takes the past as central to constitutional interpretation, but insists on viewing it at a high level of generality.⁹¹ As will become evident in Part III, this kind of argument is better described as progressive—a mode of history driven by a narrative of progress and a willingness to discard aspects of the past that are inconvenient. The “softness” is motivated by a different vision of how we ought to relate to our constitutional past.⁹²

⁸⁷ *Id.* at 212-13.

⁸⁸ See Nelson, *supra* note 1, at 1246.

⁸⁹ Nelson argues that this will be the case because most of the time, we will have to choose a context in which to explore a historical question, which will shape the answer we give to it. *Id.* at 1252.

⁹⁰ *Id.* at 1292 (concluding that judges—even those who recognize that in many hard cases, history gives us no answers—should consider themselves “compelled by American political theory’s doctrines of positivism and neutrality to be an interpretivist in those cases where only one context is available for examining the meaning of a constitutional text”).

⁹¹ Cass R. Sunstein, *Five Theses on Originalism*, 19 HARV. J.L. & PUB. POL’Y 311, 313 (1996). Sunstein identifies this kind of originalism with Ronald Dworkin and Justice Brennan. *Id.*

⁹² Similarly, there are many historians who insist that history can lead us to reasonably definitive accounts of the meaning of the past, but are just as sure that these meanings ought not be accorded legal authority today. Because they sunder the link historicism draws between the past and authority, they also do not properly belong in the historicist category. Many historians of our constitutional past adopt this mode, at least some of the time, because historians are generally interested in “a dead past; a past unlike the present [whose] differentia of the historical past lies in its very disparity from what is contemporary,” and this interest leads them to “emphasize all the ways in which [the] meaning [of past practices] depends upon the material conditions, symbolic systems and tacit assumptions in which they were embedded.” Robert W. Gordon, *On the Critical Use of History: The Arrival of Critical Historicism*, 49 STAN. L. REV. 1023, 1025 (1997). Perhaps the most influential example of this kind of argument is H. Jefferson Powell’s attempt to out-originalist the originalists, by showing that “original intentionalism was

C. Benjamin's Critiques

These modes of constitutional argument suffer from the same two errors identified in the above discussion of Benjamin's critique of historicism. First, historicism attributes a false certainty to its history, and by doing so, fails to take responsibility for its own acts of interpretation. Second, in order to defend its conflation of the past and authority, historicism reduces history to heritage. It thus serves the victors of the past, and undermines historicism's claim to the contemporary legitimacy that it seeks.

1. Fallacy One: History is Certain, and by Itself Authoritative

Historicist arguments about the Constitution conflate the domain of fact with the domain of history. They do this because they want to borrow certainty for history from the domain of facts; they insist that because facts can be known finally and beyond dispute, history can also be known in the same way. In other words, they confuse the necessary relationship that facts have to history with a determinative relationship that facts do not have.⁹³

For Benjamin, "no fact that is a cause is for that very reason historical."⁹⁴ As discussed above, Benjamin does not contest the notion that there are facts in the past, or that past events can be the cause of other events past or present. Benjamin's argument that no historical image can be definitive does not, therefore, rely upon the view that there are no facts. Benjamin is devoted to facticity, and ascribes fully to

in fact a form of structural interpretation," and that "[t]o the extent that constitutional interpreters considered historical evidence to have any interpretive value, what they deemed relevant was evidence of the proceedings of the state ratifying conventions, not of the intent of the framers." Powell, *supra* note 77, at 888. Another example of this mode can be found in Jack Rakove's book *Original Meanings*. See JACK N. RAKOVE, *ORIGINAL MEANINGS* (1996).

⁹³ As shorthand, we can think of the difference between factual inquiry and historical inquiry this way: if a surveillance camera could provide the answer to the question, the question is not a historical one. It is instead a question of fact—perhaps an important one (much of what the judicial process does, after all, is determine facts), but not a historical one.

⁹⁴ Walter Benjamin, *Theses on the Philosophy of History*, in *ILLUMINATIONS*, *supra* note 8, at 263. The German word for fact that Benjamin uses is *Tatbestand* (rather than *Tatsache* or *Fakt*). Walter Benjamin, *Über den Begriff der Geschichte*, in 1 *GESAMMELTE SCHRIFTEN*, *supra* note 33, at 704. *Tatbestand* has a legal connotation, and can also mean evidence, or the "facts of a case." His choice of *Tatbestand* over *Tatsache* can be read to suggest that such facts always are discerned and take on meaning through an act of judgment, not of passive perception. Ranke, in contrast, contended that "[e]vents which are simultaneous touch and affect each other; what precedes determines what follows; there is an inner connection of cause and effect. Although this causal nexus is not designated by dates, it exists nevertheless. It exists, and because it exists we must try to recognize it." Ranke, *supra* note 45, at 40.

the importance of facts to historical construction.⁹⁵ What he rejects is the notion that a fact carries an inherent meaning which reveals itself in history or that dictates the contours of the historical image.⁹⁶ Past facts themselves do not arbitrate among the histories that may correspond to them. They only take on meaning when we exert ourselves in relation to them, when we interpret them.⁹⁷

Returning to the figure of the constellation, we cannot derive definitive constellations by addressing ourselves to the inherent "meaning" of stars. Stars have many qualities that can be described factually—age, distance from the earth, distance from one another, brightness—but while these factual qualities may relate to constellations, they do not determine them. And the position of a star in the night sky, while "true" in some sense, and something that can be mapped, is at the same time a product of our own perspective. This does not mean that we are incorrect to relate to the stars in this way, for what matters to us, when making constellations, is what we make of the stars as they appear to us. Benjamin believes the same holds true for past facts. They have many aspects or forms that do not correspond to the order of historical interpretation. Although they exist, and can sometimes be ascertained—in the same way that some stars can be seen and mapped in the night sky—they have a mysterious autonomy, one that ought to be respected. But they also have a stability, an objectivity—the property of objects—that permits us to relate the past to the present in ways that make sense to us.⁹⁸ This, finally, is what Benjamin means when he says that the past is an "index."

⁹⁵ Benjamin was a collector, and also asserted the centrality of the fact to his own writings. He wrote that his Arcades project was an attempt to grasp the origin of the Paris arcades "through economic facts." But the facts of facts do not tell us very much, in Benjamin's view.

These facts, seen from the point of view of causality, that is, construed as causes, do not however constitute ordinary phenomena; they become this only insofar as in their own development (*Entwicklung*)—unfolding (*Auswicklung*) might be a better word—they allow the whole series of the arcade's concrete historical forms to emerge, like a leaf unfolding forth from itself the entire wealth of the empirical plant kingdom.

Walter Benjamin, *N*, in BENJAMIN, *supra* note 20, at 50.

⁹⁶ Arendt, *supra* note 8, at 48 ("What mattered to [Benjamin] above all was to avoid anything that might be reminiscent of empathy, as though a given subject of investigation had a message in readiness which easily communicated itself, or could be communicated, to the reader or spectator . . .").

⁹⁷ Thus Benjamin wrote: "That which is original is never revealed in the naked and manifest existence of the factual; its rhythm is apparent only to a dual insight. It . . . is related to its history and subsequent development." Walter Benjamin, *Eduard Fuchs, Collector and Historian*, in ONE WAY STREET, *supra* note 19, at 352. That is, facts take on their meaning through insight, and thus their meaning is always under development. It is always a product of "dual" insight, insight that is dialectical, that combines the present and the past.

⁹⁸ As Sontag writes, "Benjamin remained faithful to things—as things." Sontag, *supra* note 19, at 17. To Benjamin, "[o]nly because the past is dead is one able to read it. Only because history is fetishized in physical objects can one understand it." *Id.* at 21.

We can chronicle the past, but when we seek to know something about it, we can only do so by making images, which requires interpretation. Every history must leave facts out, must pick one among an infinite number of historical questions to answer, and must make a leap between facts and historical meaning, involving an interpretive act not amenable to full or final resolution. Bernard Williams makes a similar point when he insists that "there can be agreement on [historical] facts and disagreement about what makes sense of them to whom. Given some period or sequence of events, very different narratives will make sense of it to different parties, and this may involve not just a difference but a conflict . . ." ⁹⁹ And that matters because, for Benjamin, knowledge of the facts is not properly called knowledge at all—instead, "all human knowledge takes the form of interpretation." ¹⁰⁰

A few examples will help elucidate the point. It is a fact that President Abraham Lincoln was assassinated in 1865. Under Benjamin's terms, however, that fact in and of itself is not historical. In order to become historical, that fact must be placed in relation to other facts, and interpreted from the place of the present day. A historian is not interested in the fact of Lincoln's assassination alone. He is interested, instead, in what that fact means in conjunction with other facts, such as Andrew Johnson's decision to issue mass pardons and oppose the platform of the Radical Republicans. His historical questions—for example, whether it was inevitable that the ideal of equal citizenship for blacks would rapidly be sacrificed during Reconstruction—have no single and demonstrably "true" answer. They are claims, and attempts to persuade, and Benjamin tells us that they will always be related, however distantly, to a concern of the present that defines the historian's interest in the history he seeks to construct. ¹⁰¹

Finding the facts involves investigation, and the facts can be more or less certain, depending on the quality of the evidence and the quality

⁹⁹ BERNARD WILLIAMS, *TRUTH AND TRUTHFULNESS* 240 (2002). Williams' analysis here is very similar to that offered by Benjamin. Like Benjamin, Williams distinguishes between facts, which can be true or false, and historical narratives that are drawn from such facts. Although Williams wants very much to hold onto the notion that history can be "true" (for him, truth operates like Benjamin's facticity), he also insists, like Benjamin, that such truth does not get us very far: "There is no such thing as 'the truth' about the historical past, though . . . there are many truths about it." *Id.* at 257. Williams also shares with Benjamin a sense of the importance of our own exercise of agency in the present: "Making sense of [the past] on a larger scale," Williams writes, "will be a matter of interpretation, and interpretation is up to us. The past will not make sense unless we make sense of it." *Id.* at 244; *see also* Part IV, *infra*.

¹⁰⁰ Sontag, *supra* note 19, at 18 (quoting a Letter from Walter Benjamin to Christian Florens Rang (Dec. 9, 1923)).

¹⁰¹ To offer a few examples, the historian might be interested in understanding race relations in America today, or why it is that the Democratic Party has such a difficult time winning southern states in a national presidential election, or whether a different kind of Reconstruction, one that might have left us with less social stratification today, might have been possible.

of the sleuthing. But constructing history is a different act altogether, one that it is possible to get wrong—by invalidating the facts, or ignoring them—but that it is not possible to get definitively right. There are many different ways to put facts together to make meaning out of them in relation to one another. Returning to the metaphor of the constellation, it is possible, in the same stars, to see both the Little Dipper and Ursa Minor. One is not more correct or definitive than the other as far as the stars are concerned. A history, like a constellation, can only be “true” in one very limited sense, in the same way that it can be false: it can get its facts (or stars) right (or wrong). But many histories will meet this criterion for “truth.” Historical events, as Norman Spaulding recently put it, “are, to say the least, not merely complex, but overdetermined.”¹⁰² In order to sort between such histories, we need a criterion that is external to the facts themselves. As we will discuss in Part IV, this measure is, for Benjamin, always a measure of the insight and impetus that the historical image provides to the present.

Facts themselves do not carry historical meaning. If you sum them up, you get a chronology, not a history. If they are to have meaning, that meaning must be given to them, in relation to other facts and, for Benjamin, in relation also to the present. There are several different ways to understand the necessary uncertainty of the historical act. For one, all historical accounts choose to relate only some of the possibly relevant facts. Deciding which facts are relevant necessarily requires an act of decision.¹⁰³ Constitutional canons¹⁰⁴ are one way to try to

¹⁰² Spaulding, *supra* note 7, at 2031-32.

¹⁰³ For example, imagine that we can agree that the appropriate question of historical meaning in *Brown v. Board of Education*, 347 U.S. 483 (1954), is: “Given what we know of the views of the framers of the Fourteenth Amendment, does the Constitution permit the racial segregation of public schools?” (We can imagine other ways of framing the historical question, of course, and this presents yet another problem for those who purport to write objective history. But note that we can concede to historicists both the fact of facts and the ability to agree upon a common question, and still demonstrate that their histories are neither definitive nor self-authorizing.) Can there be a definitive historical answer to that question? Benjamin would say no, because every attempt to put facts together to create meaning relies upon acts of selection and interpretation. Two different historicists will answer this question differently, because they will focus on different historical facts. Raoul Berger, for example, looks to two facts about the framers: (1) they generally supported segregation, and (2) they did not view the Amendment’s language as open-ended. He therefore concludes that *Brown* was wrongly decided. See RAOUL BERGER, GOVERNMENT BY JUDICIARY 99-133 (1977). Robert Bork chooses different facts, insisting: (1) that many Framers believed that separate was equal; but (2) that by 1954 it was clear that it was no such thing. He therefore comes out in favor of the Court’s holding in *Brown*. See Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 3 (1971). Each of these “facts” is complex enough that they themselves are the product of interpretative acts. They cannot be posited before answering a series of interpretive questions, such as: Who are the Framers (for example, do they include those who opposed the Constitution or an Amendment)? What does equality mean? Should what the Framers thought about their words be determinative? Many “facts” that matter in these kinds of arguments will have the same property—they will themselves be the product of interpretations, and thus will necessarily fail to take the judge

sidestep this problem. But entries in a canon can and do change in ways that respond to political developments in the present.¹⁰⁵ Additionally, new facts are always being born into the constitutional sky, and drawing upon these can always retrospectively change the meaning of past facts, like a plot twist in a movie that changes the way we see all of the events that came before it.¹⁰⁶ Any truly historical interpretation, therefore, requires judgment and agency.

outside of the domain of interpretation. The point here is not whether either Berger or Bork got their facts right. The point is that both could get the facts right and still come up with different interpretations of these facts, which is to say, different historical interpretations.

¹⁰⁴ Jack M. Balkin & Sanford Levinson, *Commentary: The Canons of Constitutional Law*, 111 HARV. L. REV. 963, 989 (1998).

¹⁰⁵ For example, at one time in the not too distant past, Charles A. Beard's *An Economic Interpretation of the Constitution of the United States* was one of the most important historical accounts of the Constitution for theorists of constitutional law. CHARLES A. BEARD, *AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES* (1913). Today, Beard's text is much less important to constitutional scholars than Gordon Wood's *The Creation of the American Republic*. GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787* (1969). The popular shift from Beard to Wood is less a result of objective evaluations of the "truth" of each historical account than it is of the republican revival in constitutional theory. See Laura Kalman, *Border Patrol: Reflections on the Turn to History in Legal Scholarship*, 66 FORDHAM L. REV. 87, 96 (1997). Similarly, Jack Rakove's account of the Founding may be popular today, but Benjamin would insist that this is not because it is *right*, but because it provides the present with a way of meaningfully connecting itself to the past. The interest that we take in a historical question will, according to Benjamin, predetermine what we make of the past, because the needs of the present tell us what to look for and when to stop looking.

Consider another example. The past two decades have seen an upsurge in interest in Anti-Federalist thought. Although the *Federalist Papers* were published as a book as early as 1788, there was no comprehensive collection of Anti-Federalist thought until 1981. See THE COMPLETE ANTI-FEDERALIST (Herbert J. Storing ed., 1981); Paul Finkelman, *The Complete Anti-Federalist Edited by Herbert J. Storing*, 70 CORNELL L. REV. 182, 182-83 (1984). But new constitutional concerns and political movements have found in the anti-Federalists a useful pedigree, and thus constructed new theories about the relevance and authority of Anti-Federalist writings. For example, some argued that the Anti-Federalists understood, and might therefore be able to teach us about, the flaws of our contemporary Constitution, such as the Imperial Presidency, and the risks of a secretive national government. Finkelman, *supra*, at 195-96 (noting the "eerie modernity" of Anti-Federalist concerns). It is hardly surprising, therefore, that the Anti-Federalists were "discovered" as a new and newly authoritative source in the 1980s, in the wake of the Vietnam War, the Pentagon Papers, and Watergate. A recently published citation analysis of Supreme Court decisions concludes that the current Supreme Court majority in federalism cases (which we might better call anti-federalism cases) is much more likely than the dissenting group to reflect the views of Anti-Federalists. See Peter J. Smith, *Sources of Federalism: An Empirical Analysis of the Court's Quest for Original Meaning*, 52 UCLA L. REV. 217, 223 (2004) (noting that the majority tends to cite more often to Anti-Federalist framers, and, where they cite Federalist framers, they tend to cite statements that tended to address and placate Anti-Federalist concerns). From his results, Smith concludes that "judges seeking the original understanding are largely unconstrained in their ability to mold the historical record to serve instrumentalist goals." *Id.* at 217; see also Michael C. Dorf, *No Federalists Here: Anti-Federalism and Nationalism on the Rehnquist Court*, 31 RUTGERS L.J. 741 (2000). I thank Jack Balkin for bringing this example to my attention.

¹⁰⁶ Consider the example of Lincoln's assassination discussed above. If the historical question being posed were, "What effect did the undermining of radical Reconstruction efforts have upon racial hierarchy in the United States?," the answer to this could well differ depending on the

The preceding analysis sharply undermines the usual defense of historicism, which is that one answer to a historical question “will almost always appear better than the other.”¹⁰⁷ If this is true, it is not the past—the facts that we can know about the beliefs of the Framers, or the traditions of the majority—that will make it so. It will be determined, instead, by some act of interpretation that occurs within, and is inevitably influenced by, the present. Turning the historicist metaphor of “blot[ting] out everything they know about the later course of history”¹⁰⁸ on its head, Benjamin insists instead that “[t]he events surrounding the historian and in which he takes part will underlie his presentation like a text written in invisible ink.”¹⁰⁹ The political concerns of today send the historian in search of the past—and the nature of that interest structures what he will find there.¹¹⁰ In this, Benjamin shares the view of Oliver Wendell Holmes Jr., who once wrote, “[h]istory has to be rewritten because history is the selection of those threads of causes or antecedents that we are interested in—and the interest changes.”¹¹¹ There is no history without a subject constructing it; there is no interest that is not formed in dialogue with the time to which our own lives have assigned us.

Good history, according to Benjamin, is responsive to, and takes responsibility for, that fact.¹¹² Insofar as historicists deny this, and lay claim to definitive or final historical accounts, they err. The most ambitious historicist arguments, which seek definitive historical answers to deep questions of constitutional meaning, err because when they pose a question of meaning, they pose a question that cannot be answered definitively. More modest historicist arguments seek to avoid this problem by addressing themselves to questions of fact rather than questions of meaning. Questions of fact might have conclusive answers, but they are not historical questions.¹¹³ What of the common

degree of racial subordination that exists today. Our view of even these distant events could well change, for example, if we were to reach a point where schools were *de facto* integrated and income and opportunity were not stratified by race.

¹⁰⁷ Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U. L. REV. 226, 244 (1988).

¹⁰⁸ Walter Benjamin, *Theses on the Philosophy of History*, in ILLUMINATIONS, *supra* note 8, at 256.

¹⁰⁹ Walter Benjamin, *N*, in BENJAMIN, *supra* note 20, at 67.

¹¹⁰ See *id.* at 60 (noting that there is no “homogenous history” of economics or literature or jurisprudence, because “the various epochs of the past are touched in varying degrees by the present of the historian . . . [making] a continuity of historical presentation . . . unattainable”).

¹¹¹ Thomas C. Grey, *Holmes and Legal Pragmatism*, 41 STAN. L. REV. 787, 812 n.103 (1989) (quoting Holmes).

¹¹² This point will become clearer after the discussion about Benjamin’s conception of the *Jetztzeit* in Part IV, *infra*.

¹¹³ For example, Nelson asks rhetorically whether anyone can doubt the historical intention behind the Constitutional Amendment that provides that those having attained the age of eighteen can vote. Nelson, *supra* note 1, at 1258. The answer might, in most circumstances, be no; or

historicist claim that even if it is not possible to entirely blot out the present, it is possible to get "close enough" to make their histories at least mostly objective? Benjamin would insist that this is another category mistake. Objectivity pertains to the domain of facts, not history. Although facts have their own objective reality, it is not possible to "objectively" tell a history. Those who claim to be telling mostly-objective history, then, misunderstand the role that the present and the subjectivity of the historian always plays in the staging of historical questions, the construction of certain historical constellations, and the interpretation that provides the impetus to the image drawn. That does not make the historian "biased," nor does it make the history that she writes unresponsive to fact. As will become clear in Part IV, however, Benjamin would insist that those who purport to be objective in the strong, interpretive sense of the word, misapprehend the nature of the true historical project, which does not blot out the concerns of the present, but instead occupies and actualizes them.

This, then, is the first problem with historicism: the certainty to which historicist arguments lay claim is an illusion. There is also a second problem. This illusion, like a Trojan horse, allows historicists to smuggle acts of interpretation into the law without admitting to it. Historicist constitutional arguments typically claim present-day authority for the history that they tell, and seek to attribute this authority to the past itself. But, to paraphrase Benjamin, nothing that is past is for that reason authoritative. Every attempt to attribute authority to the past requires an interpretive act.

Constitutional historicism insists that history, as a mode of inquiry, can provide judges with interpretive limits. It claims, somewhat paradoxically, to be a non-interpretive mode of constitutional interpretation.¹¹⁴ It thus presents the histories it tells as having a certain authority stemming from the certainty of the history, suggesting that

more accurately, that no circumstance has yet arisen in which that intent is not plain. (In fact, the present is always producing new problems of constitutional meaning, even where such meaning might seem, at first glance, to be plain. Consider the recent discussions over whether former President Bill Clinton could run as a Vice Presidential candidate. *See, e.g.,* Jack Schafer, *Vice President Bill Clinton? Take 3*, SLATE, Sept. 7, 2000, available at <http://slate.msn.com/id/1006013>.) But all that this tells us is that Nelson has posed a question of fact and not of history. This is the historical analogue to the argument Robert Post makes about the inadequacy of the "plain language" rule as the favored rule of textual interpretation: "if for any reason [a] meaning has become questionable, it is no help at all to instruct a judge to follow the 'plain meaning' of the constitutional text. A meaning that has ceased to be plain cannot be made so by sheer force of will." Post, *supra* note 75, at 14.

¹¹⁴ It is not clear, of course, why, if there is no interpretation to do, judges are required at all. This is another version of the plain meaning fallacy that Post identifies. *See supra* note 113. If historical analysis requires no interpretive skill, then how can judges argue over the historical meaning of the Constitution? A historicist might contend that some judges are simply better, more accurate historians than others, but this argument fails if Benjamin's understanding of history is correct.

the constellation it pictures possesses and fulfills its own criterion of legitimacy. If it instead required an act of interpretation to bestow this history with authority, then historicist arguments would not escape the one domain that the historicist constitutionalist seeks to escape: that of judicial interpretation. But even if history could produce definitive meaning, it would still not have authority in the present until we theorized why it ought to. This is particularly evident when we are talking about the Constitution. A relation must be constructed between the Constitution and its history in order to grant the past authority over the present. But uncertainty necessarily seeps into the historicist project at this point, because that relation is always constructed through an interpretation. Acts of constitutional interpretation must provide an account of their legitimacy. For historical interpretations, this account will include a claim that their sources are relevant. But it is one thing to claim that particular sources are relevant or authoritative; yet another to insist that this claim is not itself an interpretive one. Although the former argument is necessary, the latter is neither necessary nor persuasive.

Richard Kay recounts that when Justice Black was once asked to justify some unpopular constitutional decisions made by his Supreme Court, he replied, “the Court didn’t do it. . . . The Constitution did it.”¹¹⁵ As Kay points out, “[a]ccording to this view, when a court finds unconstitutional the otherwise lawful action of some agency of government, it merely acts as the executor of a conclusive determination already embedded in the Constitution.”¹¹⁶ This is the historicist move par excellence: it is not the judge, but the Constitution and its history that make the decision. But once we sever the link between history and authority, and admit that the attribution of authority to a text or image or narrative is always itself an interpretive act, historicists are back down the rabbit hole of judicial interpretation. The only thing that historicism accomplishes with this move, therefore, is a disavowal of its own interpretive agency.

2. Fallacy Two: History is the Same Thing as Heritage

The second fallacy to which historicist claims about the Constitution fall prey is that they confuse history with what Benjamin called “heritage.” This confusion is related to the first fallacy: in order to narrow the historical field to one that has more hope of generating certainty and authority, historicism focuses only on documents that

¹¹⁵ Kay, *supra* note 107, at 226.

¹¹⁶ *Id.*

appear to be bounded and authoritative. Recall Hannah Arendt's articulation: "Insofar as the past has been transmitted as tradition, it possesses authority; insofar as authority presents itself historically, it becomes tradition."¹¹⁷ Benjamin saw the conflation of tradition/transmission with history and thus authority as catastrophic, because it domesticates the past and serves those he called the victors of history. Constitutional historicism has its own version of this problem, and as we will see, it undermines its claim to legitimacy in the present.

It is time to address a question that some may be troubled by: Does the task of the constitutional lawyer or theorist thinking about the past really compare to the task of the historian? If not, can Benjamin's criticism of the methodology of historicism properly be applied to the methodology of constitutional historicism? The argument may go something like this: Lawyers do "law office history."¹¹⁸ They turn to the past in the service of constitutional interpretation. Modes of discerning constitutional history are always also modes of constitutional interpretation. They are attempts not only to say what the past "really was," but also to attribute legal authority to the past. Historians do not have to do this.¹¹⁹ So while Benjamin's conception of history may be worthy as far as it is applied to historians like Ranke, why should it have relevance to the decisions that lawyers must make when they attempt to construct constitutional history?

Benjamin is relevant to constitutional theory because constitutional thinkers are subject to their own versions of all of the missteps that Benjamin's historicists did. As the last two sub-sections have shown, constitutional historicists wish to claim authority and certainty for constitutional history, just as historicists such as Ranke wished to claim authority and certainty for the histories that they wrote. But as I have demonstrated, the past cannot bear the burden that either version of historicism seeks to place upon it. Constitutional historicists *are* under a different obligation than historians to offer interpretations of how their histories relate to constitutional authority, but they seek to solve their authority problem in the same way that Benjamin's historicists did: they focus only on aspects of the past that appear to have their own authority, what Benjamin called "heritage."

Historicist arguments, relying on the contractarian theory described above, most commonly posit that contemporary authority comes from our agreement to something in the past. We may ascertain what we

¹¹⁷ Arendt, *supra* note 8, at 38.

¹¹⁸ See, e.g., Larry D. Kramer, *When Lawyers Do History*, 72 GEO. WASH. L. REV. 387, 389 (2003).

¹¹⁹ A historian can develop an account of the meaning of the Thirteenth Amendment without also offering an account of how and whether that meaning ought to have constitutional authority. No one would be surprised, therefore, to find many more lawyers than historians making historicist arguments, which conflate history with authority.

agreed to by looking at the evidence surrounding the passage of particular constitutional provisions, which historicism presumes comes in three basic forms: (1) evidence of the views of the federal body that drafted the constitutional text; (2) evidence of the views of the state bodies that ratified the text; and (3) evidence of the views of "the People" more generally.¹²⁰ If we are to take the democratic justification of historicism seriously, it would appear that the most authoritative understandings or intentions—indeed, the only *truly* authoritative understandings or intentions—would be those of the People themselves, who are the ultimate source of the text's legitimacy.

Unfortunately for historicists, there are no sources that fully correspond to or reveal the intentions of the People. Nevertheless, if prior consent is to constrain interpretation, it must be both discernable, and sharply bounded in meaning. Historicists thus seek proxies for the People's intent, turning to bodies of evidence that can be more readily ascertained, that are codified, and that offer a limited number of views to be aggregated.¹²¹ As a result, historicism ironically relies upon sources in inverse proportion to the value that the democratic justification for historicism suggests these sources ought to have.

Thus, historicist arguments rely heavily, if not exclusively, on the views of the Framers, and often express, but rarely defend, the assumption that the views of the Framers matter most to constitutional

¹²⁰ See, e.g., Robert N. Clinton, *Original Understanding, Legal Realism, and the Interpretation of "This Constitution,"* 72 IOWA L. REV. 1177, 1180 n.4 (1987) (noting that those who seek objective evidence of the intended meaning of constitutional texts look to an "interpretive universe" that "may include the members of the Philadelphia Convention, the members of the state ratification conventions, or the 'We the People of the United States' referred to in the preamble"). The category of "the People" is sometimes reduced to that of the "electorate," but that itself raises another interesting problem: Should "the People" be understood to be only the legal electorate at a given point, or the subjects of the Constitution more broadly—including those who would become part of the electorate, but were not at the time? I am not aware of any historicist that precisely addresses this issue, but it poses a question about how democratic the mode of historicism really can be, and how we evaluate this.

¹²¹ Ronald Dworkin offers the most comprehensive critique of this position in a discussion of statutory interpretation. He points out that there are innumerable mental states that might matter to one who presumed that a law obtained its justification from democratic assent, including the views of members of Congress who did not speak, the views of citizens who wrote letters to their representatives or otherwise made their views known to representatives, the lobbyists who pressed for one or another change, and even the views of those who could later have amended the law but did not. See RONALD DWORKIN, *LAW'S EMPIRE* 318-19 (1986). And although Dworkin is talking about statutes, the problem only gets worse with constitutions, which may have additional participants, such as state ratifiers. Dworkin rightly concludes that "judgments about whose thoughts count will be sensitive to [the interpreter's] views on the old question whether representative legislators should be guided by their own opinions and convictions, answerable only to their own conscience, and on the newer question whether lobbying, logrolling, and political action committees are a corruption of the democratic process or valuable devices for making that process more efficient and effective." *Id.* at 319-20. Dworkin goes on to contend that even if we could pick an authoritative group, we would still have the problem of divergent views within that group—providing yet another aporia of interpretation to which historicism fails to adequately respond. *Id.* at 320-21.

meaning.¹²² In order to more authoritatively excavate the views of the framers of different portions of constitutional text, historicists turn to the written documents that they assert most authoritatively reflect these intentions, such as Madison's notes of the Constitutional Convention¹²³ and the Federalist Papers, despite the fact that such sources themselves possess only a weak claim to accurately express the views of the Framers, much less the People.¹²⁴ Many constitutional scholars have suggested that the state ratification debates are a better proxy for the will of the People than are the secret discussions of the Philadelphia Convention,¹²⁵ but historicists exhibit little interest in these debates.¹²⁶ Even textualists and objectivists who claim to seek only the contemporary meaning of the constitutional text often find themselves working primarily, if not solely, from nearly the same narrow range of sources that intentionalists use.¹²⁷

¹²² So, for example, Raoul Berger looks to the view of Congress, rather than state ratifiers, when he seeks to establish the fixed meaning of the Fourteenth Amendment. See RAOUL BERGER, *GOVERNMENT BY JUDICIARY* (1977). He also insists that the views of the Framers of the original constitutional text are the most authoritative sources. See RAOUL BERGER, *FEDERALISM: THE FOUNDERS DESIGN* 13-20 (1987). And Robert Bork asserts that "[i]t is necessary to establish the proposition that the framers' intentions with respect to freedoms are the sole legitimate premise from which constitutional analysis may proceed." BORK, *supra* note 70, at 10. As Robert Post has written, "[b]y far the most common form of historical interpretation . . . regards the intentions of the Framers as the best evidence of the agreement represented by the Constitution." Post, *supra* note 75, at 21.

¹²³ JAMES MADISON, *THE PAPERS OF JAMES MADISON* (H. Gilpin ed., 1842).

¹²⁴ See Post, *supra* note 75, at 22 (noting that "*The Federalist Papers* are by common convention now presumed to constitute authoritative (and convenient) evidence of the intent of the Framers, although any historian could easily demonstrate the empirical inadequacy of the presumption"); see also James H. Hutson, *The Creation of the Constitution: The Integrity of the Documentary Record*, 65 TEX. L. REV. 1, 24-35 (1986) (discussing the debates over the reliability of Madison's notes, and stressing, in particular, that Madison only appears to have taken down a small portion of the discussions that took place each day). As noted above, of course, Benjamin's critique does not turn on the claim that the documents that historicists use *must* be "inaccurate" or "untrue." Rather, it is the selection of these documents, and the suppression of others, and the necessary act of interpretation that occurs when we engage with them—in other words, the valence of the process of the historicist historian, rather than particular *veracity* of his materials—that Benjamin calls attention to.

¹²⁵ See, e.g., Post, *supra* note 75, at 22; Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 214 (1980).

¹²⁶ This may be because there is only one source that directly reports on the state ratification proceedings themselves. See Hutson, *supra* note 124, at 13; see also *id.* at 21 (noting that the compiler of these state ratification convention notes confessed that they were "inaccurately taken down").

¹²⁷ Textualists such as Justice Scalia, who seek to interpret the Constitution by considering what its words meant at the time that they were enacted, argue that a slightly broader set of sources is appropriate to the historicist inquiry. But because they are after the same thing as the intentionalists, and similarly believe that they must find it in authoritative texts, they end up using much the same sources. For example, Justice Scalia insists that he is not at all interested in divining the intent of the Founders, but nonetheless relies upon texts like the Federalist Papers, because the writings of Framers like Madison and Hamilton "display how the text of the Constitution was originally understood." Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in A

The readiness with which historicists turn to certain sources over others has more to do with their ability to defend the resulting history as authoritative than it does with the place each particular source *theoretically* ought to have in our constitutional order, according to the democratic claims of constitutional historicism.¹²⁸ The desire to speak authoritatively leads historicists to privilege certain texts over others, limiting what they can see in the constitutional text. Constitutional historicists thus make the same mistake that Benjamin's historicists did: they attach themselves to certain documents because these documents have survived and carry with them the illusion of *sui generis* authority. But the subset of authorities that historicist constitutional arguments rely upon no more represents the full and proper domain of the history they seek to tell than does the subset of authorities that Benjamin's historicists relied upon.

A bias is built into historicism's approach to history—one that is not accidental but rather immanent to this approach to history. Historicists weld together two claims to fashion history as an authoritative interpretative weapon: First, the relevant past is found only in a select set of texts, authored by a much smaller group than that which historicism claims to draw authority from. Second, we today

MATTER OF INTERPRETATION 3, 38 (Amy Gutmann ed., 1997). I am therefore inclined to agree with Robert Clinton when he insists that, in practice, there is little difference between "subjective" and "objective" versions of originalist arguments. See Clinton, *supra* note 120, at 1181 n.4. It is less clear whether this same criticism about the limitation of historical sources would apply to traditionalist or modest historicist arguments; this likely would depend on which version of tradition or past truth is being invoked.

¹²⁸ There are many ways to try to structure one's sources in order to be able to claim authority for the resulting interpretation. One is to name a particular set of texts—which one has access to—to be authoritative, and then claim to be able to interpret them objectively. Another way is to apply mathematical and statistical methods to the past, treated here as data, to attempt to force the past to reveal its truths. Constitutional historicists tend towards the former, given the dominant narratives of legal legitimacy in the present. The latter strategy was adopted by the Cliometricians, who focused particularly on the issue of slavery. See 1 ROBERT WILLIAM FOGEL & STANLEY L. ENGERMAN, *TIME ON THE CROSS: THE ECONOMICS OF AMERICAN NEGRO SLAVERY* 7 (1974). Cliometrics is also a kind of historicism; it insists that its "central aim [is] the discovery of what really happened." *Id.* at 8. Like Ranke, Cliometricians did not always insist that they could find the right answer—because sometimes data did not exist or was not reliable—but they insisted that their mode lead to true understanding where appropriate data was available. *Id.* at 9. Also like historicists, their desire to be free from bias leads them "to base [their] statements on evidence drawn from as high up in this hierarchy of reliability as possible," and devalue "fragmentary evidence" based upon "unverifiable impressions of individuals" subject to ideological biases, but have greater confidence in fragmentary evidence from "objective" sources, or any systematic data. *Id.* at 10-11. Interestingly, literary studies has recently been subject to a cliometric attack, led by Stanford Professor Franco Moretti, whose mode of interpretation involves charting and counting, rather than reading. See Emily Eakin, *Studying Literature by the Numbers*, N.Y. TIMES, Jan. 10, 2004, at B9 (noting that Moretti tries to explode the canonicity of the literary discipline by writing a "history of literature as data points"). Such scholarship is very Benjaminian in its fierce attachment to facts, and its desire to reconfigure what counts as an authoritative source. But the resonance with Benjamin ends at the moment these methods claim to be producing a single authoritative or definitive interpretation of the past's data.

must turn our own authority of interpretation over to these same texts, because the identity of We the People present is conflated with the identity of We the People past.

The first claim introduces one kind of bias. As we have seen above, limiting the historian or judge to only “authoritative” constitutional texts does not, in fact, produce definitive answers to real questions of interpretation. There are a lot of stars, even in the strictly authoritative constitutional sky, and new ones are always being born.¹²⁹ But because they want to produce authoritative history, historicists must restrict themselves to a limited universe of texts, a canon that can change, but which can never exceed the domain of the authoritatively transmitted. But only certain kinds of history are codified in written texts. So the historicist canon can be opened to allow in, for example, Anti-Federalists,¹³⁰ but it is much harder to see how it could be expanded to include the largely uncoded views of plebian white men or slaves at the time of ratification.¹³¹ This is one of the catastrophes that the search for authority that emanates from the past produces.¹³²

The second claim introduces another kind of bias, which is probably more dangerous than the first. It is easiest to see in the contractarian mode of historicism, and in the context of those amendments that dramatically changed the political identity of “the People” by eliminating status-based barriers to formal citizenship. According to current historicist methodology, it is always the political subjects who preceded an amendment that give meaning to its injunction. That is because historicists adopt a proceduralist fetish, treating the intent of those who framed a document as authoritative, even if the amendment itself undoes the notion that those who framed it, did, in fact, have a legitimate claim to authority.

If history and the Constitution are soldered together at the point of “original intent,” we must, for example, read the Thirteenth Amendment from the point of view of the legislators who wrote its words, and ignore the meanings that might have been attributed to the Amendment by those who were purportedly liberated by its injunction. We are also obliged to read the words of the Nineteenth Amendment according to the imagined intent of the men who passed it, rather than the women

¹²⁹ This is evidenced by the tendency of both the majority and the dissenters in (anti)federalism cases to rely upon the views of the Framers in making their arguments. *See infra* note 105 and the accompanying discussion.

¹³⁰ *See supra* note 105.

¹³¹ Historicists adopt the view that Ranke insisted upon, that is—that everything that is undocumented should be avoided by the true historian. *See supra* note 48.

¹³² As discussed above, things that appear as authoritative *on their own*, Benjamin would insist, only achieve that appearance by drawing upon the authority of the victors. The appearance of authority is a sign that you have won, according to Benjamin. And only things that have been part of the possibly authoritative in the past—that would have been codified—can become part of an authoritative canon.

who demanded it—the women who only after its passage had the right to be included in the domain of constitutional intention.

There is something undeniably awkward about the insistence that the Amendment that gave women the right to vote is defined by an intent that was constituted through women's exclusion. Even if we adopt the marginally more expansive inquiry advocated by textualist modes of historicism and expand our sources to, say, the "intellectual atmosphere of the time,"¹³³ we still invest the amendment most closely associated with women's emancipation with meanings developed under conditions of their exclusion.

The exclusion problem is different from and much more troubling than the so-called "dead hand problem" elucidated by those who object to originalism.¹³⁴ To object to dead hands is generally to say that we would rather not be born into laws that are not of our own making, especially when they were made in years past. In that sense, all law (including statutes and the common law) has a dead hand problem, and the constitutional problem is just of a special magnitude because of the differential difficulty of exerting our collective will to change the constitutional text. But as Benjamin emphasizes, we are always already bound to the past, because it is the material we use to understand the time in which we live. And in a democracy we are, or course, inevitably bound by wills that are not our own, and always by laws that came before us.

The crucial *political* objection to historicism cannot be based upon a notion that we would rather not be born into history or language, but would prefer to make it all up ourselves. Everyone is born into a language and political system not of their making. The crucial question is, who inhabits the power to remake political meanings, and how? If we all shared that power equally, and always had, then the only problem with the authority claimed by historicists would be the problem of the bias of their sources. And though I could complain that I did not choose this Constitution in the same way that I did not choose to speak English as a first language, it is hard to see how this is a relevant political objection.

The objection that Benjamin brings into view is not about being governed by an abstract will that is not entirely one's own. It carries with it not just a concern about will but about distribution, not just

¹³³ Scalia, *supra* note 81, at 856.

¹³⁴ See Christopher L. Eisgruber, *The Living Hand of the Past: History and Constitutional Justice*, 65 *FORDHAM L. REV.* 1611, 1613 (1997). Eisgruber puts it this way:

Adherents of the Dead Hand Fallacy believe that our obligation to honor specific constitutional provisions—such as those creating an independent president or life tenure for judges of the right to a jury trial in common law civil cases—is in service of a more general obligation to yield to the will of past super-majorities.

Id.

liberty but equality. It focuses our attention on the *particular* subjects that have been authorized to make constitutional meaning since the text's inception. Catherine MacKinnon poses the issue succinctly: "No woman had a voice in the design of the legal institutions that rule the social order under which women, as well as men, live."¹³⁵ The issue is not really that no woman helped draft the Constitution. After all, none of today's men did either, and to frame it as a matter of immediate self-representation is simply to subsume this point under the rubric of the dead hand. Rather, the important point here is that the subject "woman" was excluded from constitutional subjectivity and participation at the time of the Framing. Women's subordination was presupposed in the formation of United States, and this originary exclusion shaped the political discourse that emerged as constitutional.

A recent case illustrates the point. In *United States v. Morrison*,¹³⁶ the Supreme Court struck down that portion of the Violence Against Women Act (VAWA) that provided a federal civil remedy for victims of gender-motivated violence.¹³⁷ The Court first concluded that Congress lacked the power to enact the provision under the Commerce Clause. It reasoned that gender-based violence did not "substantially affect commerce" because "[g]ender-motivated crimes of violence are not, in any sense of the phrase, economic activity."¹³⁸ Although the pivot of the argument was the 1995 *United States v. Lopez* decision,¹³⁹ the basic principle that the Court insisted upon—"[t]he Constitution requires a distinction between what is truly national and what is truly local"¹⁴⁰—was located in much older cases such as *Marbury v. Madison*¹⁴¹ and *A.L.A. Schechter Poultry v. United States*.¹⁴²

The *Morrison* Court also rejected the Fourteenth Amendment as a basis for Congressional power, citing the "time-honored principle that the Fourteenth Amendment, by its very terms, prohibits only state action."¹⁴³ That rule had been laid down in two 1883 cases, *United States v. Harris*,¹⁴⁴ and the *Civil Rights Cases*,¹⁴⁵ and the Court insisted

¹³⁵ Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1281 (1991).

¹³⁶ 529 U.S. 598 (2000).

¹³⁷ 42 U.S.C. § 13981 (2000).

¹³⁸ *Morrison*, 529 U.S. at 613.

¹³⁹ 514 U.S. 549 (1995).

¹⁴⁰ *Id.* at 617-18.

¹⁴¹ 5 U.S. (1 Cranch) 137 (1803). The majority opinion cited *Marbury* for this proposition: "Departing from their parliamentary past, the Framers adopted a written Constitution that further divided authority at the federal level so that the Constitution's provisions would not be defined solely by the political branches nor the scope of legislative power limited only by public opinion and the legislature's self-restraint." *Morrison*, 529 U.S. at 616 n.7.

¹⁴² 295 U.S. 495 (1935).

¹⁴³ *Morrison*, 529 U.S. at 621.

¹⁴⁴ 106 U.S. 629 (1883).

¹⁴⁵ 109 U.S. 3 (1883).

that *stare decisis* was particularly compelling in this instance, because the rule had been “on the books” for such a long time, and because every Member of the Supreme Court at the time “had been appointed by Presidents Lincoln, Grant, Hayes, Garfield, or Arthur, and each of their judicial appointees obviously had intimate knowledge and familiarity with the events surrounding the adoption of the Fourteenth Amendment.”¹⁴⁶

Despite their differences, the majority’s arguments are in one crucial way the same: they both derive their authority from sources and majorities that were forged long before women were enfranchised. Where were women as political subjects when the definition of commerce and the scope of the Fourteenth Amendment were decided? Where were they when the balance of state and federal power was struck, and it was decided that the federal government could not directly regulate the family? The official answer is, nowhere.¹⁴⁷ Is it implausible that if the definition of the “truly national” had been forged through a process that required women’s political participation in national governance, it might have taken on a very different cast? Or that, had women participated as full political subjects in the drafting of the Fourteenth Amendment, they might have demanded that the federal government be authorized to regulate “private” conduct such as that at stake in *Morrison*? The very fact of VAWA’s passage could, of course, be taken as evidence in favor of this hypothesis. As could the vast field of scholarship that has emerged over the past several decades theorizing the gendered nature of the Constitution’s conception of the public.¹⁴⁸

Before traveling too far down this road it must be admitted that the counterfactual is absurd; and that is precisely the point. It is impossible to conceptualize the shape of the Commerce Clause as if the subjectivity of women helped define it because it did not. But this much ought to be clear: Historicists tell a version of constitutional history that predominantly incorporates women through a relation of exclusion. Through the authority of the histories that they tell, and then would write into law, women continue to be those who did not decide whether § 5 of the Fourteenth Amendment authorizes Congress to regulate

¹⁴⁶ *Morrison*, 529 U.S. at 622.

¹⁴⁷ Note, for example, that the sole reference to women appearing in the *Federalist Papers* refers to the “danger[] that the private intrigues of courtesans and mistresses pose to the safety of the state.” LINDA KERBER, *WOMEN OF THE REPUBLIC: INTELLECT AND IDEOLOGY IN REVOLUTIONARY AMERICA* 105 (1980). We might argue, of course, about whether statements like these represent a form of exclusion or a very selective kind of “inclusion.” (Ought we conclude that women were left out of the *Federalist Papers*, or suggest that they were included as a threat to the state, as sexually troublesome subjects?) For my purposes here, what matters is that women were not included as *political* subjects, as citizens in the full sense of the term.

¹⁴⁸ See, e.g., CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 215-34 (1989); MacKinnon, *supra* note 135, at 1281; CAROLE PATEMAN, *THE SEXUAL CONTRACT* (1988).

private action, or whether the Commerce Clause permits Congress to pass laws granting federal jurisdiction over gender-motivated violent crimes. And they remain without the power to change this unless they mobilize under the banner of a new Amendment, a burden under which subjects who have always already been included do not labor.

The exclusion problem is of course not limited to women. African-Americans were not enfranchised in time to play a role in establishing the "intended meaning" of the Thirteenth and Fourteenth Amendments, or to play their rightful role in the "intellectual atmosphere" of the time. Indeed, one is led to wonder why, if historicists are so possessed by the need for "consent," they do not insist that the entire constitutional document should be renegotiated after any status-based barrier is lifted. How can it be that historicism derives its legitimacy from the claim that it protects democracy? Why is it former slaveholders, rather than former slaves, who get to define the word "slavery" in the Thirteenth Amendment?

Some would say that this exclusion has no bearing upon the current legitimacy of the Constitution. As long as the rules were followed, as long as the texts that we inherit were passed in *procedurally* legitimate fashion, these rules can legitimately constrain present day political decisions.¹⁴⁹ But there is an irresolvable tension—an aporia—between the democratic legitimacy that historicists want to claim and the procedural legitimacy that they must rely upon to justify their method of interpretation. Most Americans think that if they are bound by constitutional law it is because it is *their* law. Historicists trade on this sensibility, mobilizing a narrative identification with the people *today*, to claim legitimacy in the present for their methodology of fidelity to the past. The problem lies in who counts as "we." Either the past was procedurally legitimate, but they were not us, or they were us, but not all of us were rulers, making the past procedurally illegitimate.

Historicism thus trades on two inconsistent views: It insists that We the People and We the Rulers are the same group, and always have been. But that is clearly not the case. The Fifteenth and Nineteenth Amendments prove that, at least from the perspective of the present day.¹⁵⁰ In the historicist paradigm, either the Constitution is

¹⁴⁹ There is, of course, a very good argument that many of our most hallowed constitutional texts—from the Reconstruction Amendments to the original text—were enacted in procedurally improper fashion. See, e.g., ACKERMAN, *supra* note 1.

¹⁵⁰ Those groups that still have not successfully mobilized for inclusion into our procedural democracy—children, legal permanent residents, and so forth, cannot make the same complaint. Under current constitutional rules, or the theories of democracy that currently hold broadest sway, or the legitimization narrative of historicism, there is no democratic problem with excluding children from voting but applying laws to them nonetheless. Under all three of these schemas, there is, however, a profound problem today with presuming that women's interests ever were adequately represented by their husbands, or slaves by their masters. The Fifteenth and Nineteenth Amendments would appear to have decided that, because their passage required a

procedurally legitimate or it is democratically legitimate. Historicist theory wants to have it both ways, but it breaks down: the historicist claim to an authoritative past and the historicist claim to serve democracy in the present cannot be reconciled. If we split apart narrative identification from procedural legitimacy by challenging the existence of an ahistorical “We,” it becomes apparent that historicists must in fact choose between their affiliation to the past and their affiliation to democratic legitimacy in the present. They choose the past.

Historicists arguments also serve the past where their anchor is majoritarian tradition rather than contractualist consent. The horizon of tradition that historicists look to may long predate the entry into citizenship of many of those considered necessary constitutional subjects today. The notion of “common consent” expressed by toleration of past laws or practices is already strained; it becomes unrecognizable to the discourse of contract if it is suggested that political consent can be expressed by those who are formally excluded from both the political process and the sphere of public discourse. Similarly, authority that is granted to the status quo ante simply out of a sense of duty to the dead is difficult to reconcile with the view that our legal order, and particularly our Constitution, has changed in ways that could not be undone without seriously affecting its legitimacy or viability today. No traditionalist would publicly defend a Constitution that tolerated the exclusion of women from the electorate. And yet the mode of history that traditionalist historicist arguments practice has the same effect: it attributes authority to legal traditions that emerged under conditions of exclusion that are intolerable today.

When elaborated according to the dictates of historicism, our Constitution embodies a paradox: the legal conditions of equality and democracy are drawn from a constitutional history and discourse that did not intend this very democracy, this very equality—indeed, that barred it. Historicist arguments fail when they claim a legitimacy that stems from the present and an authority that stems from the past. Benjamin understood this, and therefore sought to properly claim authority for history by rooting it firmly in the present, while making it responsive to the past. I will elaborate upon this in Part IV, when I discuss his theory of redemptive history. But before I turn to Benjamin’s redemptive alternative, I will address the second relation to history that Benjamin criticized, a relation that he called progressivism.

repudiation of any such logic. See, e.g., Reva Siegel, *She the People: The Nineteenth Amendment, Sex, Equality, Federalism, and the Family*, 115 HARV. L. REV. 947 (2002) (discussing the theories of familial representation that were repudiated through the Nineteenth Amendment).

III. AGAINST PROGRESS

A. *The Concept and Critique of Progress*

Benjamin's historical project went "hand in hand with an immanent critique of the concept of progress."¹⁵¹ Benjamin understood progress as a worldview with deep roots in the Enlightenment.¹⁵² His primary example of progressive thought came, however, not from philosophy, but from the German Social Democratic Party (SPD), whom Benjamin accused of having a "conception of progress which did not adhere to reality but which made dogmatic claims."¹⁵³ At the time of Hitler's rise to power, the SPD was the largest political party in Germany, but its response to the Nazi threat was remarkably tepid, even conciliatory.¹⁵⁴ Benjamin—along with many historians¹⁵⁵—attributes this to the SPD's conviction that they would eventually and inevitably prevail, that all they had to do was keep strictly to a legal framework and their party and ideas would attract growing support. The SPD's belief in progress, he asserted, conditioned their view that fascism was just a phase, and that they were the ones truly "moving with the current" of history.¹⁵⁶ The belief in progress engendered their "conformism," and their "servile integration into an uncontrollable apparatus," in which Benjamin saw disaster.¹⁵⁷

"Progress as pictured in the minds of Social Democrats," Benjamin writes, "was, first of all, the progress of mankind itself (and not just advances in men's ability and knowledge). Secondly, it was something boundless, in keeping with the infinite perfectibility of mankind. Thirdly, progress was regarded as irresistible, something that

¹⁵¹ Walter Benjamin, *N*, in BENJAMIN, *supra* note 20, at 67.

¹⁵² See Rabinbach, *supra* note 10, at xii.

¹⁵³ Walter Benjamin, *Theses on the Philosophy of History*, in ILLUMINATIONS, *supra* note 8, at 260.

¹⁵⁴ See W.L. GUTTSMAN, THE GERMAN SOCIAL DEMOCRATIC PARTY, 1875-1933 322-23 (1981). For example, the SPD did not resist when, in 1932, the SPD-led Prussian government was illegally removed from power. *Id.* at 322.

¹⁵⁵ See *id.* at 322. Among the evidence Guttman cites is a pamphlet published on the day that Hitler came to power by a member of the SPD Party Executive entitled "Be Ready That's What Matters." *Id.* at 327 n.80. Another historian notes that "[i]t was argued, not only in the SPD, that it might be the best tactic to let [Nazism] come to power and run itself into the grave. Variants of this argument were heard up to 30 January 1933," when Hitler came to power. E.J. FEUCHTWANGER, FROM WEIMAR TO HITLER 235 (1993).

¹⁵⁶ Walter Benjamin, *Theses on the Philosophy of History*, in ILLUMINATIONS, *supra* note 8, at 258.

¹⁵⁷ *Id.* Whether Benjamin was right about the SPD and the response that they should have mounted against Hitler is, of course, a matter of historical interpretation (or construction, as Benjamin would have said). For our purposes, that is less important than interpreting the figure that the SPD plays in Benjamin's critique, to help elucidate his concept of progress.

automatically pursued a straight or spiral course. . . ."¹⁵⁸ These predicates are central to how Benjamin characterizes the progressive sensibility, and why he rejects it.

First, Benjamin identifies progressivism with the conviction that mankind "itself" can improve. This is a criticism of a mathematical logic that measures success against an average, "'dismiss[ing] the claims of individual eras or individual men and . . . ignor[ing] all their misfortune, provided that mankind as a whole has made progress.'"¹⁵⁹ Indeed, how is it possible to assert that mankind "as a whole" makes progress when some members do not? The concept of mankind here gives a patina to a claim that is, at heart, about the advance of some rather than all. Benjamin rejects this view, asserting that "'there can be no progress which does not add to the happiness and perfection of those individuals who previously suffered an imperfect lot.'"¹⁶⁰

The second claim that Benjamin associates with progressivism is the notion that the horizon of progress is infinite, that mankind is infinitely perfectible. He writes,

[i]t was inevitable that the concept of progress should run up against the critical theory of history the moment that progress was no longer presented as a measure of specific historical changes, but rather as a measure of the span separating a legendary beginning from a legendary end of history. In other words: as soon as it becomes the signature for the course of history *in its totality*, the concept of progress is associated with an uncritical hypostatization rather than with a critical placing into question.¹⁶¹

As is evident from the discussion of Benjamin's theory of history above, he rejects the notion that history can be viewed or summed up as whole. Progressives thus err when they impose upon the infinitely rich past and unknowable future a vision of totality. The kingdom of God, Benjamin insists, "is not [the] aim but [the] end" of history.¹⁶²

The last tenet of progressivism is that mankind not only can become perfect, but that it *will*, as a matter of course. Progressives believe that history is on their side, and that their views will inevitably

¹⁵⁸ *Id.* at 260.

¹⁵⁹ Walter Benjamin, *N*, in BENJAMIN, *supra* note 20, at 71 (quoting the philosopher Rudolph Hermann Lotze).

¹⁶⁰ *Id.* (quoting Lotze). Benjamin also notes that Lotze, who he calls a critic of the concept of progress, "counters the opinion that 'enough progress has taken place when . . . in the general context of an ongoing level of ignorance, the education of a small minority strives ever higher' with the question: 'How can one speak of a history of mankind given these assumptions?'" *Id.* at 73.

¹⁶¹ *Id.* at 70. As I note in Part IV.A *infra*, Benjamin did not reject the notion that things could improve in the future. For him, there is a kind of progress that we can strive for, but it is not one that is guaranteed, or ever fully achieved. See *infra* note 213 and accompanying text.

¹⁶² De Man, *supra* note 27, at 45 (quoting and translating from Walter Benjamin, *Theological and Political Fragment*, in REFLECTIONS, *supra* note 38, at 312, 314).

triumph. No fact from the past or present has the power to disrupt or derail the narrative that they tell.¹⁶³ They can retrofit any past or present event in order to make it match their concept of history.¹⁶⁴ Benjamin thinks that this tendency makes progressives complacent and undermines their ability to both see and react to the dangers of the present, because it privileges an attachment to the ideology of advance over any evidence to the contrary. No one can prove a progressive wrong when he insists that things will be better tomorrow, or if not tomorrow, then the day after tomorrow, or maybe the day after that. Because the belief in progress determines the trajectory of history in advance, it robs us of the capacity to experience what is actually happening in the present. Or, as Benjamin puts it, "[t]he current amazement that the things we are experiencing are 'still' possible in the twentieth century is *not* philosophical. This amazement is not the beginning of knowledge—unless it is the knowledge that the view of history which gives rise to it is untenable."¹⁶⁵

For Benjamin, an Enlightenment faith in progress, or texts, or political practices that guarantee our eternal advance, is a dangerous, pacifying delusion. Benjamin's view echoes that of Abraham Lincoln, as expressed in his address to the audience at the Young Men's Lyceum of Springfield:

But, it may be asked, why suppose danger to our political institutions? Have we not preserved them for more than fifty years? And why may we not for fifty times as long? We hope there is no *sufficient* reason. We hope all dangers may be overcome; but to conclude that no danger may ever arise, would itself be extremely dangerous. There are now, and will hereafter be, many causes, dangerous in their tendency, which have not existed heretofore¹⁶⁶

¹⁶³ Walter Benjamin, *Theses on the Philosophy of History*, in ILLUMINATIONS, *supra* note 8, at 261. "Real political experience," in contrast, Benjamin says, is "absolutely free" from the appearance that things are always the same. Walter Benjamin, *N*, in BENJAMIN, *supra* note 20, at 63.

¹⁶⁴ Ranke and Benjamin shared this concern, and both adopted a similar criticism of Idealist approaches to history. Ranke sounds a great deal like Benjamin when he warns against Fichte's philosophically driven view that: "[e]verything worthy of knowledge would seek only to know to what extent the philosophic principle can be demonstrated in history: to what extent the progress (*Fortgang*) of mankind, seen *a priori*, takes place." Ranke, *supra* note 45, at 36. Benjamin wants to transcend the opposition between Idealism and Historicism, by positing a form of history that neither idolizes the past "as it really was," or subsumes it to the ideology of progress.

¹⁶⁵ Walter Benjamin, *Theses on the Philosophy of History*, in ILLUMINATIONS, *supra* note 8, at 257.

¹⁶⁶ Address of Abraham Lincoln before the Young Men's Lyceum of Springfield, Illinois (Jan. 27, 1838), in 1 THE COLLECTED WORKS OF ABRAHAM LINCOLN 108, 113 (Roy P. Basler ed., 1953).

Like Lincoln, Benjamin suggests that the potential dangers of treating the future as foreordained will always outweigh the benefits. Vigilance may have costs, but they are less than the costs of complacency.

Benjamin thus rejects the progressive view that we ought to measure injustice on average rather than with particularity, that it is possible to leave the past behind and to achieve heaven here on earth, and that we should relinquish our powers of perception in favor of a belief that the future will always be brighter. What these three concepts have in common, he says, is their sense of "progression through a homogenous, empty time."¹⁶⁷ Benjamin insists that "[a] critique of the concept of such a progression must be the basis of any criticism of the concept of progress itself."¹⁶⁸ Such a critique would lead us to the realization that "[h]istory is the subject of a structure whose site is not a homogenous, empty time, but time filled with the presence of the now [*Jetztzeit*]."¹⁶⁹ I will discuss Benjamin's notion of *Jetztzeit* in Part IV, *infra*. For the moment, it is sufficient to note his most fundamental critique of progressivism is that it eviscerates our ability to perceive and act upon the present.

The belief in progress, Benjamin insists, requires us to relinquish our ability to connect to a past that could motivate and orient change in the present. This is figured vividly in Benjamin's image of the angel of history:

His face is turned toward the past. Where we perceive a chain of events, he sees one single catastrophe which keeps piling wreckage upon wreckage and hurls it in front of his feet. The angel would like to stay, awaken the dead, and make whole what has been smashed. But a storm is blowing from Paradise; it has got caught in his wings with such violence that the angel can no longer close them. This storm irresistibly propels him into the future to which his back is turned, while the pile of debris before him grows skyward. This storm is what we call progress.¹⁷⁰

The belief in progress propels the angel into the future, preventing him from attempting to undo the catastrophe that historical forces have not ceased to produce. Disaster ensues because causal forces from the past continue to operate today, throwing wreckage at the angel's feet.

Benjamin did believe in historical causes, forces that persist through time and have political effects.¹⁷¹ As Holmes once quipped,

¹⁶⁷ Walter Benjamin, *Theses on the Philosophy of History*, in *ILLUMINATIONS*, *supra* note 8, at 262.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 257-58.

¹⁷¹ Benjamin discusses such forces in the "Theses," for example, when he describes the trend towards greater technologization and exploitation of nature that he understood to be linked to the "technocratic features" of fascism. *Id.* at 259. Benjamin criticized the Social Democrats for being blind to the dangers of this dynamic. *Id.* at 258 (noting that the Social Democrats

"historic continuity with the past is not a duty, it is only a necessity."¹⁷² Benjamin would have agreed, for he believed that we can act to rescue the present from catastrophic wrongs. The past can be an important tool in this fight, and Benjamin believed that we must seize hold of it when it flashes up, offering us a chance to perceive and to act.¹⁷³ In his account, there are several reasons the past can be useful to those seeking to act in the present. First, wrongs are conditioned by historical forces, and we must understand these forces in order to act against them. Second, addressing ourselves to the facticity of the past (when conceived of as all of that which has come before, rather than as the spoils of tradition) can help us disrupt narratives of heritage and progress that blind us to possibilities past and present. Third, it is in the past that we find the affect that drives us to act in the present. As Frank Michelman once asked: "Without the past, . . . who am I? . . . Who are we? . . . Without a sense of our identity, how do we begin to make a case for anything? Without mining the past, where do we go for inspiration?"¹⁷⁴

Progress narratives give up too much when they profess to leave the past behind; what they leave behind is a part of the present. And that which they give up may well be something that we have yet to experience or understand, but that lives on, continues to have effects, and colors our vision of both the possible and the just. For Benjamin, to discard elements of the past is to discard possible ways of understanding the present, and an essential component of our ability to change it.

C. *Constitutional Progressives*

The belief in progress of which Benjamin spoke is endemic to constitutional thought today. Although it is distinct from the progressivism of the SPD, it nonetheless partakes of the sensibility of which Benjamin spoke. Progressivism makes itself felt in all arguments that project constitutional history as a rising rather than fixed star. Progressives place their bets on the future. They offer a picture of our constitutional past as a march of progress, from status to contract, from exclusion to inclusion, from We the Propertied White Men, to We the

mistakenly thought that "factory work that which was supposed to tend towards technological progress constituted a political achievement"). The Social Democrats, he insisted, "recogniz[ed] only the progress in the mastery of nature, not the retrogression of society." *Id.* at 259.

¹⁷² Speech of Oliver W. Holmes, Learning and Science, at a dinner of the Harvard Law School Association in honor of Professor C.C. Langdell (June 25, 1895), in COLLECTED LEGAL PAPERS 138, 139 (1920).

¹⁷³ Walter Benjamin, *Theses on the Philosophy of History*, in ILLUMINATIONS, *supra* note 8, at 263.

¹⁷⁴ Quoted in Kalman, *supra* note 105, at 103.

People that are also unpropertied, of color, women, and so on. It treats this movement as unidirectional, running from less to more freedom, and it considers the Constitution the vehicle of this advance.

Applied to the Constitution, Benjamin's concept of progress is a marriage between what Robert Gordon calls progressive and teleological forms of history. For Gordon, "a narrative of progress is one in which the legal system is seen as obeying a long-term process of historical transformation—e.g. from feudalism to liberal capitalism, status to contract, subordination to equality," and "a teleological narrative is one which shows legal forms working themselves pure over time to reveal their core of immanent principle."¹⁷⁵ Believers in constitutional progress thus see past majorities and understandings as less enlightened, less free, and less equal, than We the People in the present. Like Benjamin's progressives, they adopt a "soft" approach to the constitutional past, seeking to leave most of it behind.¹⁷⁶ For progressives, our constitutional order is legitimate because it allows us to govern ourselves in the present in a way that permits our collective advance. The only use of history is to demonstrate that this is so. Progressives must disavow any notion that we, or our legal structures, might continue to feel the profound effects of injustices in the past. The progressive approach to constitutional history asserts that, in all the ways that really matter, the evils of our constitutional past have *really* been overcome.

Lawrence Tribe presents this kind of argument when he suggests that the real achievement of the Founders is

the legacy of a living Constitution—not only a Constitution capable of change, but a Constitution containing the tools for its own future development in the amendment provision of article V and in the judicial power of article III. And it contains not only the tools for its future development, but the seeds of its own future growth, in the form of a vision—a still imperfect vision—of a "more perfect Union" than the framers' own compromises had yet achieved.¹⁷⁷

For Tribe, "most of the Constitution's story . . . is a story of struggle to live by the Constitution's light—to extend its writ, making rights available to groups that had once been excluded, and making responsibilities attach to individuals who had once been exempted."¹⁷⁸ The notion that the Constitution was defective before the

¹⁷⁵ Gordon, *supra* note 1, at 1023.

¹⁷⁶ See the discussion of Sunstein's soft originalism at text accompanying *supra* note 91.

¹⁷⁷ Laurence Tribe, *Bicentennial Blues: To Praise the Constitution or to Bury It?*, 37 AM. UNIV. L. REV. 1, 3 (1987).

¹⁷⁸ *Id.* at 4. In taking this view, Tribe distances himself not only from the originalist insistence that we must bind ourselves to a past moment of idealized consent, and also from constitutional redemptivists like Justice Thurgood Marshall. See *id.* at 2-3; see also *infra* Part IV (discussing Marshall as a theorist of the redemptive Constitution).

Reconstruction Amendments, according to Tribe, “forget[s] the institutional structures” that made possible the passing of those amendments, the Court’s decision in *Brown v. Board of Education*, and the dramatic expansion of civil rights protections that occurred from the 1950s to the 1970s.¹⁷⁹

The same progressivism is also displayed in Cass Sunstein’s assertion that “much in our constitutional history is bad and no longer useable.”¹⁸⁰ This view acknowledges that there are unsavory aspects of the past, but learns from them that we must move beyond the past, further along the spiral of constitutional progress. According to this progressive mode, the forward momentum of the Constitution and its felicity for change outweigh the evils previously done in its name, because the trajectory of history is always on the rise. Rather than dwell on the past, we ought to look for the best in our history, and improve upon it.

So pervasive is the progressive spirit that it turns up in unexpected places, such as Bruce Ackerman’s theory of the dualist Constitution. Although Ackerman’s theory is, at a formal level, agnostic about the virtue of the choices that the People make, the only moments of constitutional change that he is willing to give the name “constitutional moments”¹⁸¹ all fit the progressive narrative. Thus Ackerman’s writings on Reconstruction focus on the triumph of Republican ideals of racial justice and national citizenship¹⁸²—not, as McConnell has pointed out, on the possibility that the landslide Republican defeat was a constitutional moment itself, but an evil one, authorizing the construction of a Jim Crow republic.¹⁸³ As Joyce Appleby has written, Ackerman’s “conception of [We the People’s] intentions resembles an ascending escalator, carrying the American public ever higher, even if they get off for long spells to meander through cookware and sporting equipment.”¹⁸⁴ This is not to say that Ackerman is wrong about

¹⁷⁹ *Id.* at 3.

¹⁸⁰ Cass R. Sunstein, *The Idea of a Useable Past*, 95 COLUM. L. REV. 601, 604 (1996).

¹⁸¹ For a definition and discussion of “constitutional moments,” see, for example, Bruce Ackerman, *Fidelity as Synthesis*, 65 FORDHAM L. REV. 1519 (1997). Ackerman defines a constitutional moment as a moment that “occurs when a rising political movement succeeds in placing a new problematic at the center of American political life.” *Id.* at 1519.

¹⁸² See, e.g., Bruce Ackerman, *Higher Lawmaking*, in RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT 63, 72-79 (Sanford Levinson ed., 1995).

¹⁸³ Michael N. McConnell, *The Forgotten Constitutional Moment*, 11 CONST. COMM. 115, 119-29 (1994). Ackerman rejects McConnell’s claim that 1874 was a constitutional moment. See BRUCE ACKERMAN, *WE THE PEOPLE*, VOLUME 2: TRANSFORMATIONS 471-74 & 474 n.126 (2000).

¹⁸⁴ Joyce Appleby, *The Americans’ Higher-Law Thinking Behind Higher Lawmaking*, 108 YALE L.J. 1995, 1995 (1999). Appleby goes on to say that Ackerman’s “Whiggish overlay upon the argument of *Transformations* appears most strikingly in the discussion of Reconstruction, in which all acts are optimized—whether those of intransigent Radical Republicans or white

whether 1874 was in fact a constitutional moment, or to say that he might not conclude that the next constitutional moment is, regrettably, a step backwards for We the People. Rather, it is to take note of the cadence of progressivism that suffuses his history: Ackerman's Constitution, and People, has only improved, at least so far. And nothing in its past compromises its ability to improve still more in the future.

D. *The Problem with Constitutional Progressivism*

Benjamin offers us several criticisms of the progressive attitude towards constitutional history: Progressivism is glib about the perfectibility and plasticity of the "People" and the Constitution. It risks complacency by dismissing the possibility that the Constitution is indelibly marked by the wrongs of the past, or that the future could hold less liberty and less equality. In its need to defend the Constitution as a vehicle of historical advance, it naturalizes the changes that have happened as, for the most part, the right ones. Like Darwinism, which defines those who have survived as the fittest, progressivism defines those who have prevailed as the deserving.¹⁸⁵ To maintain this view, constitutional progressivism employs the same statistical strategy that Benjamin's progressivism did: it counts the People's progress on average, but claims that the average represents us all. It also telescopes out into the future whenever she comes across groups that it thinks ought properly be liberated, and insists that they will be.

Thus, a progressive who ticks off the list of steady advances in constitutional inclusiveness will likely make no mention of the poor, who were arguably ambushed on their own constitutional march to recognition.¹⁸⁶ A progress narrative need not write off the poor; it could

supremacist Southern Redeemers. Some higher force is orchestrating this partisan cacophony into a melodious resolution." *Id.*

¹⁸⁵ Benjamin himself made this connection: "The doctrine of natural selection . . . popularized the notion that progress was automatic. Furthermore, it promoted the extension of the concept of progress to the entire realm of human activity." Walter Benjamin, *N*, in BENJAMIN, *supra* note 20, at 68.

¹⁸⁶ Consider the life of constitutional pronouncements such as those put forth in *Dandridge v. Williams*, 397 U.S. 471 (1970) (refusing to read the Social Security Act to prohibit states from capping grants by family size, and implying that welfare assistance is not a fundamental right), and *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 29 (1973) (holding that "wealth discrimination alone" does not provide a basis for invoking strict scrutiny). Anyone with a basic familiarity with constitutional law will tell you today that there is no constitutional right to welfare, and the way that they say it will typically suggest that this is intrinsic to the meaning of our Constitution, rather than a contingent interpretation that could change. One popular casebook puts it this way: "Note that in the welfare context, the claimant is not asking the government to leave him alone, but is asking it to *give* him something. The Constitution is ordinarily thought of as creating limitations on government rather than as establishing affirmative rights." GEOFFREY

just as easily conclude that there is yet time for the poor to be added to the end of the march. That is undoubtedly the case, but that reply would also suggest that there is nothing catastrophically wrong with a Constitution that does not already include freedom from want, or from discrimination on the basis of poverty, and that we also ought to expect that if such a development were a good thing, that it will eventually happen. That is, of course, the essence of the concept of progress.

As Balkin points out, most liberal constitutional theory engages in a “sort of illicit intellectual bookkeeping: all of the beneficial features of liberal democracies get attributed to their being liberal and democratic, while all of their failures are assigned to their illiberal or antidemocratic aspects.”¹⁸⁷ Indeed, one is tempted to argue that the notion of the march of constitutional progress, although not verifiable, is *necessary* for constitutional theorists, to fill a fundamental gap in the theory of constitutional democracy. Unless we believe in progress, legal authority appears remarkably fragile, even groundless. In order to see the Constitution as a document that blends reason and will,¹⁸⁸ we require a notion of progress. Otherwise what would guarantee that reason is self-perfecting, that will is succumbing to its dictates? How would we have faith in the wisdom of constitutional fidelity, if we could not be sure that the Constitution leads us in the direction of more democracy and more freedom?

R. STONE ET AL., CONSTITUTIONAL LAW 921 (3d ed. 1996). As William Forbath put it in a recent article, “[t]oday’s Supreme Court tells us that the Constitution affords no protection against desperate want, nor does it confer on Americans any other ‘affirmative rights’ to such basic goods as minimally adequate education or a realistic opportunity to make a livelihood.” William E. Forbath, *Frank Michelman on Social Rights, 1969—Present*, 39 TULSA L. REV. 597, 597-98 (2004). According to Forbath, those who think that “social rights and the solicitude for them among the world’s great courts are foreign to American constitutional experience” are “wrong.” *Id.* at 598. Instead, “[i]n the 1960s and early 1970s, the Supreme Court came extremely close to recognizing such rights in a series of statutory and constitutional cases which produced remedial schemes comparable to several under construction abroad.” *Id.* at n.7. Forbath wants us to see that a different result in the 1968 election might have lead to an entirely different history of substantive rights in the Constitution. *Id.* at 612-13. Nonetheless, the dominant image of the Constitution suggests that it never has—and implicitly never will—recognize such “affirmative” rights. This is what Balkin worries about when he expresses concern about the psychological impact of the imperative of constitutional fidelity:

Fidelity is a sort of servitude The Constitution becomes the focus of our attention, the prism of our perspective. Our efforts are directed to understanding it—and many other things in society as well—in terms of its clauses, its concepts, its traditions. Through this discipline, this focus, we achieve a sort of tunnel vision: a closing off to other possibilities that would speak in a different language and think in a different way, a closing off to worlds in which the Constitution is only one document among many, worlds in which the Constitution is no great thing, but only a first draft of something much greater and more noble.

Balkin, *supra* note 5, at 1726.

¹⁸⁷ Balkin, *supra* note 5, at 1713.

¹⁸⁸ See KAHN, *supra* note 1, at 7-30.

For Benjamin, fidelity is precisely what we should be putting under suspicion, precisely because it requires a faith that things will improve. For Benjamin, such assertions are dangerous because they can blind us to what is really happening in the present. Progressivism blinds us because it insists that the Constitution follows a path of ever greater freedom, and because it refuses to squarely confront the possibility that forces from the past might still make themselves felt today.

A few examples may help make these criticisms more visible.

1. Race and Preservation Through Transformation

Consider first the legacy of slavery in our nation's constitutional and political life. For progressives, slavery, even in the original, unamended Constitution, is a relic of the old order. The passage of the Thirteenth Amendment then solved any contradiction between the democratic nature of the original Constitution and the system of chattel slavery. Although we may have some tinkering to do in order to finally cleanse our system of racism and the legacy of slavery, the heavy lifting has been done, and indeed, was completed upon the passage of the Reconstruction Amendments.

Unfortunately, the progressive account of slavery might fail to understand the real effects of the Reconstruction Amendments. Saidiya Hartman's attempt to theorize the period of Reconstruction from the point of view of the freed slaves is a useful counterpoint here. According to Hartman, for African-Americans, the Thirteenth Amendment did not inaugurate a "definitive break between slavery and freedom, compulsion and consent."¹⁸⁹ In the immediate aftermath of the Thirteenth Amendment, slave labor was replaced by bonded labor and debt peonage, which were in turn sustained by the Black Codes.¹⁹⁰ As a result, Hartman concludes that "[n]otwithstanding the negatory power of the Thirteenth Amendment, racial slavery was transformed rather than annulled."¹⁹¹ Progressivism thus blinds us to the causal

¹⁸⁹ SAIDIYA V. HARTMAN, *SCENES OF SUBJECTION: TERROR, SLAVERY, AND SELF-MAKING IN NINETEENTH-CENTURY AMERICA* 130 (1997).

¹⁹⁰ In some states, these Codes defined any black person not in possession of a labor contract to be a vagrant. *Id.* at 145. Labor contracts administered by the Freedman's Bureau made "free" black labor conditional upon behavior that precisely echoed the social roles of slavery: laborers were to be "quiet" and "respectable" and "well-behaved." *Id.* at 147. A variety of other new laws regulated subsistence activities such as hunting and fishing, or imposed severe penalties for crimes that blacks were perceived as likely to commit. *Id.* at 146-47.

¹⁹¹ *Id.* at 10. Hartman also writes:

Certainly the freed came into "possession" of themselves and basic civil rights consequent to the abolition of slavery. However, despite the symbolic bestowal of humanity that accompanied the acquisition of rights, the legacy of freedom was an ambivalent one. If the nascent

nexus between slavery and the debt bondage that followed: both were deeply rooted in economic systems dependent upon exploitation, and the transition inaugurated by the Amendment was thus less a transformation than a preservation of the old order. To see slavery as cleanly superceded by the Thirteenth Amendment, such that its legacy evaporates, is to render ourselves unable to see this causal nexus.

A progressive has two options in the face of this kind of historical claim: He can reject the conclusion as bad history, or he can telescope time, insisting that Reconstruction is the wrong place to look for racial justice, and that we would be better off judging history according to the vast improvements in racial equality that have taken place in the last several decades. The latter move, of course, has its own dangers. As Reva Siegel notes, status-preserving behavior is mutable, and can evolve around legal attempts to interrupt it, a phenomenon she calls "preservation-through-transformation."¹⁹² So, during Reconstruction, the new constitutional mandate of racial equality was undermined by the strict doctrinal separation between civil and political rights on the one hand and social rights on the other, which justified practices and policies that "perpetuated the racial stratification of American society."¹⁹³ We witness much the same thing today, Siegel contends, in an Equal Protection doctrine that no longer protects: "[D]octrines concerning discriminatory purpose authorize certain forms of state action that perpetuate racial stratification as consistent with constitutional guarantees of equal protection."¹⁹⁴ In both cases, the notion of progress provided the necessary cover for these acts of preservation, allowing institutions, and the white majority, the comfortable sense that they had changed, when the reality of racial hierarchy remained very much the same.¹⁹⁵ As Jack Balkin and Sanford

mantle of sovereign individuality conferred rights and entitlements, it also served to obscure the coercion of "free labor," the transmutation of bonded labor, the invasive forms of discipline that fashioned individuality, and the regulatory production of blackness.

Id. at 120.

¹⁹² See Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1119, 1129-31 (1997).

¹⁹³ *Id.* at 1129.

¹⁹⁴ *Id.* at 1130.

¹⁹⁵ Siegel writes:

In the nineteenth century, the Court was confident that it had abolished slavery and granted African-Americans equal protection of the laws. In this period, doctrines concerning social rights authorized certain forms of state action that perpetuated racial stratification as consistent with constitutional guarantees of equal protection. Today, the Court is confident that it has abolished segregation and granted African-Americans equal protection of the laws. Now, doctrines concerning discriminatory purpose authorize certain forms of state action that perpetuate racial stratification as consistent with constitutional guarantees of equal protection.

Id.

Levinson write, relying upon Siegel's work, "[t]he happy story of progressive legal reform can mask the elements of unjust status hierarchies that still remain, aided and abetted by the very rules that purported to disestablish them."¹⁹⁶

2. The Gay March Towards Freedom

Next, consider the recent trend in which progressives posit gay men and lesbians as the next frontier in the march towards constitutional freedom. In a palpable way, among liberal scholars gay is, so to speak, the new black. I suspect, for example, that Lawrence Tribe speaks for many of liberal constitutional scholars when he voices his view that "[s]ame-sex marriage . . . is bound to follow [the Court's decision in *Lawrence v. Texas*]; it is only a question of time."¹⁹⁷ Tribe assesses the last few decades of race and sex jurisprudence, and concludes that "[i]t is hard to imagine that the trajectory of same-sex marriage rights will not follow the same path."¹⁹⁸

The November 2004 election, in which eleven states passed state constitutional amendments banning gay marriage, and eight states arguably banned civil unions as well, suggests that a different course is entirely possible.¹⁹⁹ Advocates of the recent state amendments have

¹⁹⁶ Further examples might be offered of this phenomenon. One can be drawn from Siegel's work on the way that privacy law emerged to protect men's prerogatives to physically abuse their wives at the same moment that notions of coverture broke down. See Reva B. Siegel, "*The Rule of Love*": *Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2179-81 (1996). Another might focus on the recent debate about the legacy of *Brown v. Board of Education*, 347 U.S. 483 (1954), and the evidence that schools today are nearly as segregated as they were on the day that *Brown* was handed down. See Richard Thompson Ford, *Brown's Ghost*, 117 HARV. L. REV. 1305, 1305-06 (2004). Today's segregation is often considered both inevitable and unproblematic (if also regrettable), because it is perceived to be the result of private preferences on all sides of the racial divide. Richard Ford argues that these purportedly natural desires are in fact legally constructed:

Legal rules, as much as private preferences, make segregation possible—indeed, almost inevitable. Segregation is not simply the reflection of private preferences; it is also the product of law. Segregation is therefore, in an important sense, a result of public policy: a policy decision to acquiesce in and to subsidize the preferences of those who prefer segregation at the expense of those who prefer integration.

Id. at 1306. According to Ford: "Today it's easy to pay lip service to the litigation that bears [the *Brown*] name, comfortable in the presumption that the hard fights have long since been won," but "if we want to make the promise of a socially, economically, and politically integrated society a reality, we should stop celebrating a victory we've yet to win and start trying to breathe new life into *Brown's* ghost." *Id.* at 1333. We cannot, of course, stop celebrating *Brown* as a conclusive victory or adequately apply ourselves to its failures if we insist on placing it in a continuum of history that casts structural racism as essentially defeated.

¹⁹⁷ Lawrence H. Tribe, *Lawrence v. Texas: The "Fundamental Right" that Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1945 (2004).

¹⁹⁸ *Id.* at 1947.

¹⁹⁹ See Adam Liptak, *Caution in Court for Gay Rights Groups*, N.Y. TIMES, Nov. 12, 2004, at

promised that an additional twelve to fifteen similar state constitutional amendments will be presented to voters in the next two years, and they are confident that a federal constitutional amendment will “move” in the coming term of Congress.²⁰⁰ That is not, of course, what happened after *Loving v. Virginia*,²⁰¹ and it is hard to see how it matches the progressive script, unless we telescope out to the infinite future and insist that victory is inevitable. There is no way at present to know whether amendments banning gay marriage will eventually be overturned. The progressive who assumes that this outcome is inevitable will, in the process, tend to minimize the harm done to those who will suffer until then, for example, because they lose their health insurance in states that disestablish domestic partnership rights for state employees, or are denied permission to adopt their own children.

The desire to believe the progressive narrative may also make those who oppose these amendments less vigorous in their opposition to them. More surely, to paint such sweeping arcs of historical movement is to suppress the forms of contestation that are, in fact, a part of all political movements. In the progressive account, *Lawrence* is the new *Brown*,²⁰² and *Goodridge v. Department of Public Health*,²⁰³ no doubt, will be the new *Loving*. But consider Katherine Franke’s recent criticism of the *Lawrence* decision. Franke contends that the opinion that Tribe celebrates “relies on a narrow version of liberty that is both geographized and domesticated.”²⁰⁴ The *Lawrence* majority limits the liberty it offers to the domestic private,²⁰⁵ and to sex that is connected to a “more enduring” personal bond.²⁰⁶ Franke argues that this is considerably inferior to the version of liberty imagined by the last several decades of queer and gay organizing.²⁰⁷ The history of contestation to which Franke refers is, of course, not visible to those

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²⁰⁰ See the comments of Shannon Royce, Director of the Marriage Amendment Project, on NewsHour with Jim Lehrer, Nov. 8., 2004, at http://www.pbs.org/newshour/bb/law/july-dec04/gaymarriage_11-08.html (last visited Jan. 27, 2005).

²⁰¹ 388 U.S. 1, 11-12 (1967) (striking down Virginia’s miscegenation law on federal constitutional grounds).

²⁰² Tribe, *supra* note 197, at 1894-95 (noting that “[i]t seems only fitting, if perhaps late in the day, that *Lawrence v. Texas* should have been handed down just a year before the fiftieth anniversary of *Brown v. Board of Education*”) (internal citations omitted).

²⁰³ 798 N.E.2d 941, 971-72 (Mass. 2003) (holding that the Massachusetts Constitution required the extension of marriage benefits to same sex couples).

²⁰⁴ Katherine M. Franke, *The Domesticated Liberty of Lawrence v. Texas*, 104 COLUM. L. REV. 1399, 1400 (2004).

²⁰⁵ *Id.* at 1403.

²⁰⁶ *Lawrence v. Texas*, 539 U.S. 558, 567 (2003).

²⁰⁷ For arguments against the attempt to secure rights to same-sex marriage, see MICHAEL WARNER, *THE TROUBLE WITH NORMAL: SEX, POLITICS, AND THE ETHICS OF QUEER LIFE* (1999) and Paula L. Ettelbrick, *Since When Is Marriage a Path to Liberation?*, OUT/LOOK, Autumn 1989, at 8, partially reprinted in WILLIAM N. ESKRIDGE, JR. & NAN D. HUNTER, *SEXUALITY, GENDER, AND THE LAW* 817 (1997).

committed to a progress narrative. Nor does the sensibility of progress permit us to wonder whether our new freedoms are either much the same as what we once had, a form of preservation through transformation, or even less than those that we once had.²⁰⁸ Finally, the progressive lens disables us from imagining trajectories such as Franke predicts: that gay marriage will follow upon the heels of *Lawrence* not because freedom is on the march, but because opponents of gay marriage will eventually find the existence of legally sanctioned sexual relationships that are not regulated by the marriage contract intolerable.²⁰⁹

One sometimes gets the sense that liberal constitutional scholars speak in progressive tones less because they believe the ideology of progress to be correct, than because of the special burden that they believe comes with their relationship to the courts. Thus, Tribe rejects the view of the many scholars who have expressed skepticism that *Lawrence* will lead to rapid recognition of same-sex relationships, declaring that he does not “feel swept up in the eagerness to sing such notes of caution, while throwing caution to the winds when it comes to courting the risk of making self-fulfilling prophecies.”²¹⁰ Such language suggests that legal theorists who want to see gay marriage legalized have an obligation to read *Lawrence* for all it is worth, because their statements, unlike those of most historians, have a unique propensity to become “self-fulfilling prophecies.”

If this is true, then maybe we all ought to be progressives whether or not we actually believe that freedom is on the march. But if Benjamin is right about the dangers of progress narratives, this kind of instrumentalism is not worth the candle. Experience gives us little reason, after all, to think that academic articles have the strong self-fulfilling capacity that Tribe suggests they might.²¹¹ This is not entirely to dismiss Tribe’s concern; after all, part of the appeal of academic legal writing is its attenuated ability to influence doctrine. But the mechanisms of this influence are difficult to predict or control, and whatever influence does exist seems to occur despite the vast differences of opinion expressed within scholarship over the likely or proper direction of any particular doctrine. Writing progress narratives

²⁰⁸ Franke is precisely worried that the trajectory of the *Lawrence* decision will lead to less freedom for those who engage in same-sex sex, and she thus encourages this community to reconsider its “rush to law, to recognition, and to state sanction.” Franke, *supra* note 204, at 1426.

²⁰⁹ *Id.*

²¹⁰ Tribe, *supra* note 197, at 1950.

²¹¹ Tribe’s articles may be the exception that proves the rule, but it is hard to see how even Tribe can persuade a Court, in the pages of the *Harvard Law Review*, that there is only one trajectory that complies with *Lawrence*. This is especially so when Tribe himself admits that he aspires to have this effect. And of course, millions of trees have been felled in the service of arguments that no court will ever adopt.

in anticipation of a readership of attentive and suggestible judges is not, I would venture, likely to do much good. It might, however, do significant harm, if it results in arguments that are either disingenuous, or that breed the kind of complacency about which Benjamin worried.

3. Civil Liberties in an Age of Terror

A final example of the dangers of the progressive attitude involves progressive responses to encroachments upon civil liberties after September 11, 2001. Consider these conclusions, propounded by Jack Goldsmith and Cass Sunstein in 2002:

During every serious war in our nation's history, civil liberties have been curtailed. Following (usually not during) each war, elites regret these restrictions on civil liberties because the restrictions often seem—from the ex post perspective when the danger of war has passed and the true extent of the threats become known—to be unwarranted or extreme. During the next war, the perceived abuses during the last war are used as the baseline for determining which civil liberties restrictions are appropriate. This dialectic produces a ratchet effect, over time, in favor of more expansive civil liberties during wartime. Of course there is nothing inevitable to this process. . . . But in the American context, with a remarkable record of military success, the historical trend has been toward increasing suspicion of intrusions on civil liberty and civil rights, even when national security seems to be at risk.²¹²

Sunstein and Goldsmith posit a “ratchet” effect that is intended to comfort us. Although the authors say that there is “nothing inevitable” about this effect, their disclaimer is undermined by the trajectory of their argument, which insists that we can, and should, place our faith in the broad contours of the historical “trend” that they identify.

For Benjamin, the forces that produced excesses in the past may well be with us today, and progressivism encourages a quietism that leaves us blind to these forces and to possible disaster in our midst. If all that we understand of *Korematsu*, for example, is that we will never again see something like it, then we presume that nothing that could even happen in Guantanamo Bay could be as bad as the Japanese internment camps. The opposite conclusion, that Guantanamo *must* be like the internment camps, is an equally bad assumption, of course. The point, for Benjamin, is to approach the past and present without quietist suppositions about what we will find, looking for historical forces at work, in order to protect ourselves from falling victim to the same set of

²¹² Jack Goldsmith & Cass Sunstein, *Military Tribunals and Legal Culture: What a Difference Sixty Years Makes*, 19 CONST. COMM. 261, 284-85 (2002).

forces, each time in a different guise. For example, rather than insist that civil liberties are always better protected in each war than the last, we would do better to examine the forces that produced the depredations of the past, and attempt to connect them to the threats of the present. Instead of assessing threats to civil liberties on average, or attempting to see in them a “trend,” we ought, Benjamin would insist, focus on the particular risks of today. None of this can come into view as long as we are focused on a narrative of progress or insisting that some things are simply no longer possible. Whether *Korematsu* can ever happen again depends entirely upon what we understand *Korematsu* to be, and upon whether or not we are willing to admit the possibility that no guarantees of “never again” can be found in the present or past.

IV. THE REDEMPITIVE ALTERNATIVE

When Benjamin inveighs against ideologies of progress he does not suggest that we should resign ourselves to a long decline.²¹³ The opposite of progress is not decline. It is redemption. According to Benjamin, the past “carries with it a [secret] index by which it is referred to redemption,”²¹⁴ and “only for a redeemed mankind has the past become citable in all its moments.”²¹⁵ I will first explicate Benjamin’s concept of redemption, which has a different sense of temporality and agency than the modes of history previously described. After elucidating Benjamin’s concept of redemption, I will offer examples of the redemptive approach to history in current constitutional scholarship.

A. *Benjamin’s Concept of Redemption*

The redemptive historian, for Benjamin, “cannot do without the notion of a present that is not a transition, but in which time stands still and has come to a stop. For this notion defines the present in which he himself is writing history.”²¹⁶ This is the first dimension of the

²¹³ Walter Benjamin, *N*, in BENJAMIN, *supra* note 20, at 48. At times, therefore, Benjamin expresses an interest in redefining the term progress, speaking of adopting a “militant concept of progress,” *id.* at 69, and defining true progress as “the first revolutionary measures taken,” *id.* at 66. These both disarticulate the notion of progress from the Enlightenment certainty that mankind’s advance is predictable and automatic.

²¹⁴ Walter Benjamin, *Theses on the Philosophy of History*, in ILLUMINATIONS, *supra* note 8, at 254.

²¹⁵ *Id.*

²¹⁶ *Id.* at 262. Benjamin calls this historian the “historical materialist,” a term that of course

redemptive approach to history: It occupies the time of the present, and “establishes a conception of the present” as something that Benjamin calls the *Jetztzeit*.²¹⁷ *Jetztzeit* designates the time that we are always living in, an eternal present that stands outside the continuum of time.²¹⁸ It is not the “present,”²¹⁹ but rather, is the place from which we observe the present and past, and bring them together to make history.²²⁰

Benjamin likens the redemptive historian to insurrectionists on the first day of the French Revolution who, he says, fired at clock towers in order to stop time.²²¹ The redemptivist seeks to arrest time in this same way, seeking to “supply a unique moment with the past,” drawing his authority from the *Jetztzeit*, rather than seeking authority in the past or the future.²²² Benjamin’s insistence on the importance of the *Jetztzeit* is first and foremost a claim about the importance of grasping our own authority and agency in relation to history. The *Jetztzeit* is a time that is susceptible to action, rather than a point in a predetermined continuum or narrative where, as with narratives of progress or the authoritative nature of monumental history, agency is always located elsewhere.

comes from the theory of Karl Marx. But Benjamin deploys this term in a different fashion than Marx—and at times in a decidedly anti-Marxist way. In this context, it would therefore be misleading to use Marx’s term. I choose instead to refer to this historian as the “redemptive” historian, because the concept of redemption is key to Benjamin’s contribution to the philosophy of history.

²¹⁷ *Id.* at 261, 263.

²¹⁸ Zohn translates *Jetztzeit* as the “presence of the now,” but it is probably better translated as the “eternal present.” I thank Susan Gillespie for suggesting this to me.

²¹⁹ *Jetztzeit* is distinct from the “present” (which, in German, is *Gegenwart*). This notion of a past interpreted with direction from the present has Nietzschean roots, see, e.g., FRIEDRICH NIETZSCHE, *UNTIMELY MEDITATIONS* 94 (R.J. Hollingsdale trans., 1983) (“If you are to venture to interpret the past you can do so only out of the fullest exertion of the vigour of the present.”), and is opposed to a historicism that presents history as a reality knowable in its own terms, uncontaminated with the needs of the present.

²²⁰ See Walter Benjamin, *N*, in BENJAMIN, *supra* note 20, at 50 (“It isn’t that the past casts its light on what is present or that what is present casts its light on what is past; rather, an image is that in which the Then and the Now come together in a constellation like a flash of lightning.”). Benjamin also writes:

For the materialist historian, every epoch with which he occupies himself is only a fore-history of the one that really concerns him. And that is precisely why the appearance of repetition doesn’t exist for him in history, because given their index as “fore-history,” those moments in the course of history that matter most to him become moments of the present and change their character according to whether this present is defined as a catastrophe or a triumph.

Id. at 65; see also Walter Benjamin, *Theses on the Philosophy of History*, in ILLUMINATIONS, *supra* note 8, at 263 (noting that the task of the historian is to understand “the constellation which his own era has formed with a definite earlier one”) (emphasis added).

²²¹ “In the July revolution an incident occurred which showed [the redemptive] consciousness still alive. On the first evening of the fighting it turned out that all the clocks in towers were being fired on simultaneously and independently from several places in Paris.” Walter Benjamin, *Theses on the Philosophy of History*, in ILLUMINATIONS, *supra* note 8, at 262.

²²² The redemptive historian thus seeks to “make the continuum of history explode.” *Id.* at 261.

The redemptive historian is, in Benjamin's terms, "in control of his powers, man enough to blast open the continuum of history."²²³ Benjamin believes above all in the vitality of the present as the moment that we seize.²²⁴ Spontaneity and action are the terms that Benjamin associates with redemption, and they are precisely opposed to the meticulous self-abnegation that Ranke seeks for the historian. Put differently, redemptive arguments trade Ranke's God for Benjamin's profane Messiah. Whereas Ranke believes that the historian's efforts "stem from a higher, religious source,"²²⁵ Benjamin insists that "[l]ike every generation that preceded us, we have been endowed with a *weak* Messianic power, a power to which the past has a claim."²²⁶ The meanings of history are made by us. They exist only as our potential, and are not awaiting discovery in the past.

It is now more clear, therefore, why Benjamin understands the historicist and progressive modes of history as catastrophic: Both, in different ways, use history to assign agency to somewhere other than the *Jetztzeit*, as part of sometimes deliberate attempts to eviscerate our collective capacity for change. They also, in different ways, claim a universality for the history that they tell. Progressive histories claim to understand the People's collective destination with certainty, and historicist histories claim to offer definitive interpretations of the past. But for Benjamin, there can be no universal or definitive history, because the domain of interpretation is not definitive, and because the *Jetztzeit* is always presenting us with new historical images to interpret.

For Benjamin, no history can ever incorporate all of the moments of the past, just as no constellation can include all of the stars. Full redemption, or the perfection of mankind, as noted above, would only be Judgment Day; it would not have any political meaning.²²⁷ In historical terms, this means that no history can capture the totality of the possible meanings of events in the past. We must always be prepared, therefore, to seize new images that the juxtaposition of present and past offers us, in order to achieve not religious redemption, but "profane illumination" in our own time.²²⁸ Profane illumination occurs in political, as opposed to sacred, time—it is the product of our own

²²³ *Id.* at 262.

²²⁴ Walter Benjamin, *One Way Street*, in *ONE WAY STREET*, *supra* note 19, at 45, 99. ("Each morning the day lies like a fresh shirt on our bed; this incomparably fine, incomparably woven tissue of pure prediction fits us perfectly. The happiness of the next twenty-four hours depends on our ability, on waking, to pick it up.")

²²⁵ Ranke, *supra* note 45, at 38.

²²⁶ Walter Benjamin, *Theses on the Philosophy of History*, in *ILLUMINATIONS*, *supra* note 8, at 254.

²²⁷ See *supra* note 38 and accompanying text.

²²⁸ Benjamin notes, in his writings on Surrealism, that "the true, creative overcoming of religious illumination . . . resides in *profane illumination*, a materialistic, anthropological inspiration." Walter Benjamin, *Surrealism*, in *REFLECTIONS*, *supra* note 38, at 177, 179.

commitment and interpretive efforts, rather than of an inheritance that we receive from the past, or the movement of world-historical forces into the future.

But what motivates and attributes value to such histories, if not certainty? I began to explore this question above, in Part II, in the discussion of the fallacies of historicism. History can be “true” to the facts, but facts do not themselves arbitrate between histories that are equally faithful to the facts. To invoke Bernard Williams again, although there are many histories that are true, there is “no such thing as ‘the truth’ about the historical past.”²²⁹ In order to sort between true histories, we need a criterion that is external to the facts themselves. How, then, are we to measure a historical image, in Benjamin’s view? If there is no “final” or ultimately true history, is there at least a *best* history? Would anyone engage in historical analysis—including Benjamin—if she did not believe that she could claim to be writing a better history than others had written?

To put the question more pointedly, and in the terms that a lawyer might, if we can agree upon a historical question, which may be easier to do in the field of law than in that of history, can we find one best answer to it? Benjamin’s answer is “no,” if objectivity is the measure of that history. There are too many ways to configure the facts or attribute meaning and authority to them to make facts themselves the judge of history. But Benjamin’s answer is “yes” if actuality, rather than truthfulness or objectivity, is used to evaluate the history. For Benjamin, “current relevance or actuality is a quality of the event, a quality that one can never find already in place but that one must construct.”²³⁰ Historical images, he insists, are measured according to what they do, by the insight and action that they spark in the present. He understood present day engagement, and in particular, political engagement, to be the only motivator of truly insightful history.²³¹ For Benjamin, the best history relates the past to current struggles, and helps

²²⁹ WILLIAMS, *supra* note 99, at 257. Williams squarely rejects the conclusion that all historical truths are, as a result, relative in the radical sense of the term:

People use the word “relativism” here, perhaps, because they have a correct sense that the differences underlying these disagreements are basically political, or ethical, or at the very least temperamental. If we do speak of relativism of historical interpretation, however, we should not contrast it with “objectivity.”

Id. at 260-61. Williams here wants to avoid the assumption that history must always be “biased,” because he does believe that some histories can be true to the facts, which in his terminology, means they are not biased.

²³⁰ Norbert Bolz, *Aesthetics? Philosophy of History? Theology!*, in BENJAMIN’S GHOSTS 226, 230 (Gerhard Richter ed. & trans., 2002).

²³¹ For example, he insisted that “[f]or lack of any active political focus, historicism reduces everything to an endless panoramic blur.” Irving Wohlfarth, *Et Cetera? The Historian as Chiffonnier*, 39 NEW GERMAN CRITIQUE 142, 164 (1986) (describing Benjamin’s theory of history).

us see forces or possibilities that help us redeem lost possibilities in the past.²³²

Finally, redemptive history differs from the other modes by the character of its prototypical act, which is the attempt “to brush history against the grain.”²³³ A redemptive history views hallowed documents and events with a “cautious detachment.”²³⁴ It does not disregard them, or sanctify them, but rather seeks to unravel their authority and free the present from their domesticating force “by exhibiting the discontinuity” that exists within them.²³⁵

The redemptive historian strives to make felt the truly new by transcending, rather than simply rewriting, tradition. Transcendence [*aufheben*] is a key concept here. Benjamin borrows the term from Hegel, and uses it to invoke a dialectical movement that at once preserves, elevates, and cancels.²³⁶ Benjamin seeks to transform rather than simply invert or replace traditions: “In every era,” Benjamin writes, “the attempt must be made anew to wrest tradition away from a conformism that is about to overpower it.”²³⁷ The act that Benjamin has in mind produces a new tradition, a counter-tradition, and also changes the notion of what a tradition is, by no longer claiming definitive status for it, or seeking to draw its authority from anywhere but the present. Instead of engaging in “appreciation or apologia,” or “cover[ing] up the revolutionary moments in the course of history,”²³⁸ the redemptivist seeks “those jags and crags that offer a handhold to someone who wishes to move beyond” the progressive and historicist accounts.²³⁹

The redemptive approach to history opens itself up to all of the past, even to the “trash” of history.²⁴⁰ Redemptive arguments, in

²³² As Bernard Williams puts it, “the dimensions of disagreement involved [in history] are not simply a matter of knowledge or explanation or to be resolved by further historical inquiry. They are matters of the needs of the various parties, and of their relations to people who have other needs.” WILLIAMS, *supra* note 99, at 260. Benjamin was not a liberal or a proceduralist, of course. While Williams focuses on the ability of histories to allow different groups to speak to and understand the needs of one another, Benjamin emphasized the ability of history to engage the fighting spirit of those who had always been on the losing side of history.

²³³ Walter Benjamin, *Theses on the Philosophy of History*, in ILLUMINATIONS, *supra* note 8, at 257.

²³⁴ *Id.*

²³⁵ Walter Benjamin, *N*, in BENJAMIN, *supra* note 20, at 63. Benjamin likened the method of his *Arcades* project to “the splitting of the atom [which] releases the enormous energy of history that lies bonded in the ‘Once upon a time’ of classical historical narrative. The history that showed things ‘as they really were’ was the strongest narcotic of the century.” *Id.* at 51.

²³⁶ See Walter Benjamin, *Theses on the Philosophy of History*, in ILLUMINATIONS, *supra* note 8, at 263.

²³⁷ *Id.* at 255.

²³⁸ Walter Benjamin, *N*, in BENJAMIN, *supra* note 20, at 64.

²³⁹ *Id.* at 65.

²⁴⁰ *Id.* at 47 (noting that the method of his *Arcades* project was to “[o]nly exhibit . . . the trivia, the trash—which I don’t want to inventory, but simply allow to come into its own in the only way possible: by putting it to use”).

Benjamin's conception, use the past to free up rather than constrain interpretation, to make new meanings in the present, rather than reiterate meanings that were ostensibly fixed in the past. To do this, and to make good on the potentiality that resides in the present, the redemptivist needs access to all of the past.²⁴¹ In fact, the redemptive approach focuses disproportionately on these discarded or disregarded elements of the past, because it is this that other methodologies bury. The trash of history is particularly important to Benjamin because it provides us with material that can help us undo dominant narratives of tradition and progress. Most useful here, Benjamin thinks, are the residues of victories and solutions that are never fully achieved, and the remnants of those who have lost in the past. That is because Benjamin believes that it is those who struggle who are the "[subject] of historical knowledge."²⁴² This class is not the working class, but "the struggling, oppressed class itself."²⁴³ And it is *knowledge*, crucially, that it provides us with.

This is an important point. Benjamin's critical, disruptive methodology is not reducible to his own political commitment to improving the lot of the dispossessed. It also derives from his understanding of epistemology, and of the *Jetztzeit*. He believed that only by understanding and working to liberate those who still struggle can we awaken from the dream of history,²⁴⁴ because narratives of tradition and progress anesthetize us and limit our powers of perception. These narratives need to be undone in order to allow us to see, and to feel. By considering the lot of those who currently struggle, and by seeking to brush history against the grain, we can properly actualize the potential of the present. We owe this not to the past, but to ourselves.

B. *Constitutional Redemptivists*

We can discern numerous examples of redemptive methodology in current constitutional thought, although they are less prevalent than examples of either historicist or progressive methodologies. Several

²⁴¹ *Id.* at 57:

Every historical perception can be visualized by substituting the image of a pair of scales, one pan of which is weighted with what was, the other with a recognition of what now is. While the facts collected on the first pan can never be too trivial or too numerous, only a few heavy, massive weights need lie on the other.

²⁴² Walter Benjamin, *Theses on the Philosophy of History*, in ILLUMINATIONS, *supra* note 8, at 260.

²⁴³ *Id.* For Marx, Benjamin writes, this struggling class was the proletariat, "the last enslaved class, . . . the avenger that completes the task of liberation in the name of generations of the downtrodden." *Id.*

²⁴⁴ Walter Benjamin, *N*, in BENJAMIN, *supra* note 20, at 52 ("[E]very presentation [of] history must begin with awakening; in fact, it should deal with nothing else.").

qualities define redemptive claims about constitutional meaning. Redemptive arguments are characterized by criticality, by an attempt to disrupt narratives of heritage or progress. They seek to place narratives about cultural treasures under suspicion, brushing them against the grain. In the service of this effort, they focus disproportionately on the trash and tragedy of history. They are convinced that we learn more from investigating the worst of our constitutional past than we do from looking to the best. They believe that we are likely to see and achieve more by seeking to undo our failures than by seeking to improve upon our successes. Finally, they believe in and embrace the authority of the present, which they see as shot through with, but not governed by, the past. They look to the past to render us able to see, and to feel, the possibilities of the present.

Jack Balkin and Sanford Levinson are two of the foremost theorists of redemptive constitutionalism today. Balkin declares that “the point of Constitutional government . . . is the eventual redemption in history of the principles of our Founding document,” a document that in true redemptive form, is not the Constitution, but rather the Declaration of Independence.²⁴⁵ Constitutional redemption is, for Balkin, an endless quest because “democracies always exist and have existed in societies shaped by existing social hierarchies and previous injustices. Democracies always live in social conditions partially hostile to the attainment of democratic ideals.”²⁴⁶ Writing together, Levinson and Balkin express concern about the power of the progressive tendency in constitutional thought to foster complacency.²⁴⁷ They want us to understand the present to be in a kind of danger, and the evils of the past to never be definitively overcome.²⁴⁸ They dissociate themselves from

²⁴⁵ Jack M. Balkin, *The Declaration and the Promise of a Democratic Culture*, 4 WID. L. SYMP. J. 167, 167 (1999).

²⁴⁶ *Id.* at 175.

²⁴⁷ See Balkin & Levinson, *supra* note 104, at 989. They write:

The story of inevitable progress has allowed progressives to harmonize the injustices of the past with their aspirations for the future. In the progressive imagination, principles immanent at the time of the Revolution (or the founding or Reconstruction) unfold and are realized through historical struggle, emerging and working themselves pure from the parochialism and injustices of the past.

Id.

²⁴⁸ Balkin, *supra* note 245, at 176 (“A narrative of redemption worships neither the past nor the present. To the contrary: it assumes that we exist, and always have existed, in a fallen condition. We live in compromises with the evils of the past, and we are compromised by them.”) Balkin also notes that “[t]he mistake of originalism as conventionally understood is that it takes too seriously the understandings of a past generation. It mistakes past compromises with injustice for the meaning of justice.” *Id.* at 177. He similarly takes aim at what Benjamin sought to discredit in the Idealist philosophy of history:

The story of our country is not a Hegelian story in which the oak is already contained in the acorn. . . . The future is something that we make, with our narrative self-understanding as our goad and guide. In every generation it is given to us to redeem the promises of the Declaration in new ways.

strong claims to the truth of their constitutional interpretations, taking interest more in the effect such interpretations can have in the present.²⁴⁹

Levinson and Balkin also strongly advocate a move away from a constitutional canon that consists solely of the statements of learned justices and law professors.²⁵⁰ In a recent article, Levinson explains why he does not intend ever again to teach first semester constitutional law students in the United States the canonical case of *Marbury v. Madison*.²⁵¹ He argues that a rich and deep historical analysis is necessary to any attempt to really understand *Marbury*, or any judicial opinion, for that matter, and that this attempt is not impossible, in the case of *Marbury*, but instead is a poor use of class time. If students are going to spend time in class learning constitutional history they should, Levinson believes, "do it about something that is truly important."²⁵² Importance, for Levinson, is measured in everyday political terms: it ought to address "issues that truly matter, whether to our students or to ourselves."²⁵³

The most important history to teach students, Levinson suggests, is the history of chattel slavery in the United States, because an understanding of that history is necessary to "thinking of what might be required to overcome it."²⁵⁴ Only by understanding the historical past of slavery, *not* through "dreadful" canonical texts such as the Civil Rights Cases, but rather, through the lived experience of blacks in post-Reconstruction America, can we address the persistent present day effects of the "peculiar institution." A further reason Levinson gives to

Id. at 177-78. Finally, he insists on the kind of actuality that Benjamin put first: a redemptive account of constitutional history, Balkin insists, "does not claim that the eventual redemption is assured. It claims only that we should strive to achieve it. . . . It does not say that redemption will occur without any effort on our part; it says that we must make the story true." *Id.* at 178; see also Balkin, *supra* note 5, at 1720 ("The aspirationalist vision is one of redemption. There can be no redemption without the recognition of sin. Thus, even at the moment when we want to read the Constitution as aspiring to great justice, we must soberly reflect on its evils, both potential and realized.").

²⁴⁹ See e.g., Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637, 642 (1989). Levinson notes:

It is not my style to offer "correct" or "incorrect" interpretations of the Constitution. My major interest is in delineating the rhetorical structures of American constitutional argument and elaborating what is sometimes called the "politics of interpretation," that is, the factors that explain why one or another approach will appeal to certain analysts at certain times

Id.

²⁵⁰ Balkin & Levinson, *supra* note 104, at 965-68 (suggesting that Fredrick Douglass's 1860 speech in Glasgow asserting that the Constitution leaned towards freedom rather than slavery, ought to be included in constitutional law case books alongside Chief Justice Roger Taney's opinion in *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856)).

²⁵¹ Sanford Levinson, *Why I Do Not Teach Marbury (Except To Eastern Europeans) and Why You Shouldn't Either*, 38 WAKE FOREST L. REV. 553 (2003).

²⁵² *Id.* at 559.

²⁵³ *Id.*

²⁵⁴ *Id.* at 560.

teach a detailed history of chattel slavery is that this helps guard against “an unjustified optimism in students that the American constitutional system, including judicial decisions, has happy endings, that it never serves as a mechanism for legitimizing evil.”²⁵⁵ In true redemptive form, Levinson worries about the predominance of progress narratives, and the propensity of such narratives to blind us to historical forces that continue to be felt today.

But perhaps the most well known theorist of the redemptive Constitution is Thurgood Marshall. In his oft-cited speech on the occasion of the Bicentennial of the Constitution, Marshall inveighs against those who would simply use the occasion to celebrate the vision of the Founders. He rejects such hagiography because “the government they devised was defective from the start, requiring several amendments, a civil war, and momentous social transformation to attain the systems of constitutional government, and its respect for the individual freedoms and human rights, that we hold as fundamental today.”²⁵⁶ The credit for the Constitution’s evolution towards redemption, Marshall insists, “does not belong to the Framers. It belongs to those who refused to acquiesce in outdated notions of ‘liberty,’ ‘justice,’ and ‘equality,’ and who strived to better them.”²⁵⁷ Rather than commemorate hallowed constitutional traditions or figures and engage in a “blind pilgrimage” to the shrine of the original document, he encourages us to “commemorate the suffering, the struggle, and sacrifice that has triumphed over much of what was wrong with the original document, and observe the anniversary with hopes not realized and promises not fulfilled.”²⁵⁸

Two constitutional scholars who seek to meet Marshall’s challenge are Risa L. Goluboff and James Gray Pope. Both turn to history to uncover images of struggle and suffering that have not yet been redeemed. Their mode is one of rescue; they seek to uncover lost possibilities in our constitutional past, and relate them to political struggles in the present to give them new life. Goluboff, for example, has written several meticulous histories of the lost intersections between race and class in the struggle for civil rights. In one, she explores the

²⁵⁵ *Id.* at 561.

²⁵⁶ Thurgood Marshall, *Commentary: Reflections on the Bicentennial of the United States Constitution*, 101 HARV. L. REV. 1, 2 (1987).

²⁵⁷ *Id.* at 5.

²⁵⁸ *Id.* As Norman Spaulding puts it, Marshall’s speech, and in particular his insistence that the Constitution did not survive the Civil War “is, in short, a provocative and revealing ‘reversal,’ . . .—an invitation to remember something we have always already forgotten, something always already exposed to the cathectic predations of collective memory.” Spaulding, *supra* note 7, at 2026. Although at times Marshall adopts a progressive cadence—noting that the Constitution has gone from slavery to respect for individual freedoms—his insistence that we ought to disrupt the commemorative tendency, and focus upon hopes still unfulfilled, is quintessentially redemptive.

different ways that lawyers in the Civil Rights Section of the Department of Justice framed civil rights claims in the 1940s.²⁵⁹ By looking for this past, a past of arguments that did *not* become constitutionally authoritative, she seeks to paint a picture of “a framework for a labor-infused civil rights that has, for the most part, been lost.”²⁶⁰ She makes the same kind of argument in a more recent article that draws upon labor and property complaints that black southern agricultural workers submitted to the NAACP that did not end up forming any significant part of that organization’s litigation or advocacy strategy.²⁶¹ Her argument is intended to demonstrate that “choices were made,”²⁶² and that there is “neither a natural correlation between race and rights nor a historical one.”²⁶³

James Gray Pope adopts a similar methodology when he seeks to explicate the labor movement’s lost “Constitution of Freedom.”²⁶⁴ For evidence of this Constitution, Pope looks not to the intentions of the Framers, but rather to the constitutional arguments that labor organizers of the 1920s developed and used to mobilize political action outside and against the court system. He insists on a need for “depth and detail” in his case study, and privileges decidedly unauthoritative constitutional sources like those penned by workers engaged in wildcat strikes and open defiance of judicial injunctions.²⁶⁵ He names workers’ struggle for their Constitution of freedom “one instance of a broader phenomenon: constitutional insurgency,” which takes place not through, but despite and outside of, formal legal institutions.²⁶⁶ He finds a value in these unofficial constitutional arguments “not only because they might become official, but also because they can shape the consciousness and action of adherents in the here and now.”²⁶⁷ Rather than being directed primarily at courts, Pope’s histories address themselves to contemporary

²⁵⁹ Risa L. Goluboff, *The Thirteenth Amendment and the Lost Origins of Civil Rights*, 50 DUKE L.J. 1609, 1613 (2001).

²⁶⁰ *Id.* at 1615.

²⁶¹ Risa L. Goluboff, “*We Live’s in a Free House Such as it Is*”: *Class and the Creation of Modern Civil Rights*, 151 U. PA. L. REV. 1977 (2003). Goluboff seeks, in the article, to “recapture the nascent rights claims of southern agricultural workers largely overlooked by the [NAACP] Inc. Fund,” and suggests that this recapturing offers us two lessons: “First, their very existence at the intersection of race and class undermines the historiography’s description of a temporal shift from one to the other,” and “second, . . . choices were made . . . [and] [u]ntil now, it has been impossible to see these critical choices because historians have ignored the potential cases the Inc. Fund left behind.” *Id.* at 1979-80.

²⁶² *Id.* at 1980.

²⁶³ *Id.* at 1978.

²⁶⁴ James Gray Pope, *Labor’s Constitution of Freedom*, 106 YALE L.J. 941 (1997).

²⁶⁵ *Id.* at 945.

²⁶⁶ *Id.* at 943. Pope therefore emphasizes the way that labor organizers made arguments—and even sought to enforce them—outside of the official court system, and in opposition to it. *Id.* at 967-77.

²⁶⁷ *Id.* at 944.

attempts to rejuvenate the labor movement and offer it a “strong consciousness of fundamental rights.”²⁶⁸

In these arguments, Pope and Goluboff direct their historical interpretations less at courts than at our collective understandings of our constitutional present and past.²⁶⁹ They seek not more authoritative constitutional meanings, but new or renewed constitutional readings that might be pressed by movements that engage with courts and legislatures, and thereby become authoritative.

There are also examples of redemptive arguments that address themselves more directly to the courts, in an attempt to construct new interpretive paradigms through which we can understand the Constitution’s text. Two recent articles in particular occupy this mode. The first is Norman Spaulding’s attempt to elucidate a method of “countermemory” to apply to the Reconstruction Amendments in the context of contemporary disputes about federalism. The second is Reva Siegel’s attempt to recast the history of the Nineteenth Amendment in terms that resonate with and inform today’s conflicts about the scope of Congressional power.

Spaulding begins by describing recent efforts in Germany to memorialize the Holocaust, or more accurately, the “‘absence’”²⁷⁰ it generated, through the creation of “countermemuments.” A countermemument (*Gegen-Denkmal*) is an anti-monumental monument, a memorial that tries to resist the tendency of monuments to “‘displace the past they would have us contemplate,’” and “‘the authoritarian propensity in all art that reduces the viewer to passive spectator.’”²⁷¹ With this project in mind, Spaulding raises the specter of the American past of chattel slavery and segregation,²⁷² and poses this question to

²⁶⁸ James Gray Pope, *The First Amendment, the Thirteenth Amendment, and the Right to Organize in the Twenty-First Century*, 51 RUTGERS L. REV. 941, 948 (1999).

²⁶⁹ Pope’s measure of success is noteworthy here. At the end of his *Yale Law Journal* article, he lays claim not to possessing a definitive or universally true history, but rather hopes that his account has provided “original[ity] of perspective, . . . authenticity as a reflection of working class experience and interpretive thinking, . . . cognitive depth, and . . . implementation in a collective action evincing strong commitment.” Pope, *supra* note 264, at 1027.

²⁷⁰ Spaulding, *supra* note 7, at 1993 (quoting JAMES E. YOUNG, *THE TEXTURE OF MEMORY: HOLOCAUST MEMORIALS AND MEANING* 45 (1993)).

²⁷¹ *Id.* at 1995 (quoting YOUNG, *supra* note 269, at 28). Spaulding offers several examples of these monuments. One, for example, is a hollow pillar filled with lead that sinks into the ground, and that permits visitors to write on—even to desecrate—the structure. In an inscription, the architects invite visitors and residents of the town “to add their names here to ours. In doing so, we commit ourselves to remain vigilant. As more and more names cover this twelve meter tall lead column, it will gradually be lowered into the ground. One day it will have disappeared completely, and the site of the Harburg monument against fascism will be empty. In the end, it is only we ourselves who can rise up against injustice.” *Id.* (quoting YOUNG, *supra* note 270, at 28, 30).

²⁷² *Id.* at 2000 (contending that “[c]hattel slavery and segregation are historical injustices of a magnitude not unlike the crimes responsible for the problem of memory Germany now confronts”).

himself: "Can a constitution be written or read against itself? Or is constitutional law accessible only in monumental form, with all its didactic, demagogic, and amnesic liabilities?"²⁷³

In the process of arguing that the Constitution should be read against itself in just this way, at least in the specific context of the Reconstruction Amendments,²⁷⁴ Spaulding develops a method of oppositional reading that he calls "countermemory." It is a mode that strongly resonates with the method of redemptive constitutionalism; "Countermemory is defined by a principle of resistance. It resists not only the self-aggrandizing, didactic logic of what Nietzsche calls 'monumental history' but the paralyzing, preservationist impulse of 'antiquarian history,' and even the truth-seeking revisionism of 'critical history.'"²⁷⁵ Like redemptivism, it does not give upon on historical facts,²⁷⁶ and it "not only depends upon and excavates resistance, it provokes it."²⁷⁷

Using this method, Spaulding takes aim at the Supreme Court's recent federalism jurisprudence, and the robust notion of states' rights and limited federal powers that cases such as *Morrison* and *Lopez* resurrect.²⁷⁸ Specifically, he draws upon three countermemories that the federalist revivalists repress: the fact of southern succession, the fact that the Reconstruction Amendments were ratified through coercive means, and the fact of the failed reconciliation that was the original

²⁷³ *Id.*

²⁷⁴ *Id.* at 2001 (citing Marshall, *supra* note 256, at 4). In fact, Spaulding contends (after Thurgood Marshall), that the Constitution did not survive the Civil War, and that the Reconstruction Amendments must therefore be read as fundamentally altering the kind of federation that we presume was preserved for the present day. Spaulding suggests that we all know, in some sense, that Marshall is right, but conclude that his insight cannot be taken into account because of the weighty responsibility that judges and academics as lawgivers must shoulder. Spaulding casts this as a kind of repression—as symptom that and marks a site of necessary analytic work. *Id.* at 2029.

²⁷⁵ *Id.* at 2003.

²⁷⁶ *Id.* (insisting that countermemory does not accept "subordination to metaphysical truth or the search for an actual past"). I take Spaulding here to mean "actual" in the sense of "definitive" or "objective," rather than factual—given his evident concern for the facts of the period of the Civil War and Reconstruction.

²⁷⁷ *Id.* at 2004. Spaulding continues, "It recalls absences, isolates and emphasizes facts inconvenient to coherence and emotional appeal of collective memory and national identity (without, at the same time, permitting any facile incorporation of these facts back into the national narrative)." *Id.* Countermemory has in common with redemptivism too; it seeks to transcend traditional histories and collective memories, rather than simply displace or replace them. And it anticipates this process as one that is difficult, one that will bring us into contact with a sense of danger that we generally repress. See *id.* at 2049 ("[R]eading the Reconstruction Amendments as countermonuments will prove exceptionally difficult memory work for anyone committed to the elaboration of a reassuring national narrative. It promises not a comforting play of recognitions but a frustrating labor of exposing and provoking resistance.").

²⁷⁸ These cases, Spaulding asserts, are "viable only as an expression of the monumental historical consciousness—that is to say, only as the result of memory work predicated on forgetting the structural significance of the Civil War and Reconstruction Amendments." *Id.* at 2006.

Thirteenth Amendment.²⁷⁹ These rarely-discussed aspects of our constitutional past, which carve out something like the negative space of the Reconstruction Amendments, should lead us to conclude that the Constitution that did survive the War was a fundamentally altered one, and that the notion of federalism that existed before the war could not have survived its crucible. He concludes: "Viewed from the perspective of countermemory, the Reconstruction Amendments cannot be read, and first principles of robust federalism cannot be invoked, without considering the 'differences between what might have been and what came to be.' The federalism revival depends upon forgetting these differences."²⁸⁰

Spaulding's argument is fundamentally redemptive in that he seeks to "recover meaning the Reconstruction Amendments appear never to have been given,"²⁸¹ much in the way that Benjamin suggests the redemptive historian "reads that which was never written."²⁸² There is one important difference, of course, between Spaulding's vision and the one that I have articulated here: Spaulding suggests that the practice of countermemory ought only be deployed in response to "mass historical injustices," and that it is most appropriate where such misdeeds have marked "the emergence of a new order or the survival or restoration of an old one."²⁸³ There is something monumental about the circumstances for which Spaulding wants to reserve the "strong medicine"²⁸⁴ of countermemory. Redemptive histories, or countermemories, may be easiest to discern and articulate where the injustices of the past are most apparent, but why ought they be limited to such circumstances? Would we not need countermemories all the

²⁷⁹ *Id.* at 2036-37.

²⁸⁰ *Id.* at 2048 (quoting HAROLD M. HYMAN, *A MORE PERFECT UNION: THE IMPACT OF THE CIVIL WAR AND THE RECONSTRUCTION ON THE CONSTITUTION* 47 (1973)).

²⁸¹ The full quote is worth reiterating here:

How can we recover meaning the Reconstruction Amendments appear never to have been given? Within a monumentalist mode of thinking about federalism and Reconstruction, answers to this question cannot emerge. Imagined first principles will always overshadow the events surrounding Reconstruction. The impulse to build a reassuring narrative from those events will always suppress their more disturbing and more radical implications. And, in the long shadow of robust federalism, the Reconstruction Amendments may appear to mean even less than they say, may literally become mere monuments, frozen in time, receding into obscurity, perhaps even vanishing entirely from collective consciousness and constitutional law.

Id. at 2023.

²⁸² Daniel Heller-Roazen, *Editor's Introduction: To Read What Was Never Written*, in *POTENTIALITIES*, *supra* note 34, at 1, 1 (citing and translating from notes for Benjamin's *Theses*, *supra* note 14).

²⁸³ *Id.* at 2004 ("Strong medicine should be sparingly prescribed, but . . . countermemory is an important technique for resisting the elisions mass historical injuries invite in the collective memory of their perpetrators and beneficiaries.")

²⁸⁴ *Id.*

more in those places where a rupture is hidden, and not manifest in a Civil War, or a series of radical constitutional amendments?

Reva Siegel's recent attempt to reread the Nineteenth Amendment offers another example of redemptive constitutional practice, one that takes a less monumental approach to the sites of constitutional meaning to which it applies itself. In her article, Siegel seeks to "interpret the Nineteenth Amendment in terms that recollect, rather than repress, the history of the suffrage campaign."²⁸⁵ It is a present day struggle, and in particular the Supreme Court's decision in *Morrison*, that drives Siegel's effort to extract forgotten elements of our constitutional past. She is concerned that the "[e]rasure of the Nineteenth Amendment from our collective memory and constitutional canon has helped produce a body of sex discrimination law that lacks foundation in our constitutional history and that defines equal protection formalistically, as a constraint on state action that draws group-based distinctions between men and women."²⁸⁶

Siegel returns to the sixty-odd years of debate that preceded the Amendment's passage in order to elaborate not a historicist history but a redemptive one. She points out that women's suffrage could not make sense without a dramatic shift in the imagined relationship between women and family and also the federal government. Prior to the debate surrounding the Amendment, Americans believed that "women were represented in the state through male heads of household and [that] enfranchising women would harm the marriage relationship."²⁸⁷ In order to be able to make women's suffrage appear as a right, the relationship between the concepts of suffrage and family had to change. Before it was possible for We the People to say that "the right of the citizens of the United States to vote shall not be denied or abridged by . . . any state on account of sex,"²⁸⁸ the imagined relationship between local self-government and federal law also had to change.

Siegel presents a thoroughly historical argument, but crucially, it is not an argument about intent, or the historicist meaning of the Amendment. Siegel is committed not to original meanings laid down by the framers of the constitutional text, but to understanding the political shift inaugurated by women's demands for full citizenship.

²⁸⁵ See Siegel, *supra* note 150 at 1030.

²⁸⁶ *Id.* at 1022. Siegel points out that the impoverished history of the Nineteenth Amendment that is told is intimately related to the continued subordination of women. Thus, "spousal" rape exemptions and differential penalties for forms of domestic as compared to other kinds of assault do not trigger heightened scrutiny as long as they are applied "equally"—in the formal sense—to women and men. Siegel argues that this is because sex discrimination jurisprudence has not paid attention either to the history of the role of law in the subordination of women, or to the issue of how women's role in the family conditions their political citizenship. *Id.* at 1025-26.

²⁸⁷ *Id.* at 951.

²⁸⁸ U.S. CONST. amend. XIX.

She seeks to undo the dominant, ahistorical reading of the Nineteenth Amendment that reduces it to a clause about voting rights; she attempts to disrupt this narrative by demonstrating that the traditional view is incoherent because it was not possible to make a national statement about women's voting rights without also making a statement about family and federation.²⁸⁹

By challenging traditional readings of the Amendment, Siegel offers us new ways to understand the constellation that the fight for women's suffrage forms with our own era.²⁹⁰ The article's relation to past wrongs is also much more redemptive than progressive: Siegel insists on the centrality of past wrongs and lost meanings to a genuine historical analysis,²⁹¹ and on the importance of articulating "a narrative of wrong and rectification" to our ability to posit the meaning of terms like justice and equality today.²⁹²

Finally, Siegel insists that she unearths this history not to constrain judgment but to inform it.²⁹³ In the end, she appeals not primarily to courts, but rather to "our self-accountings as a constitution-making people,"²⁹⁴ imagining a constitutional change that occurs not primarily via judicial pronouncement, but rather through a shift in our constitutional language and sense of history, which may only eventually change the way courts are able or willing to speak about constitutional meaning. Siegel seeks not the pronouncement of a new constitutional tradition, but a historically mediated shift in how "we know ourselves as a nation and a people—as a collective subject acting in history, the collective subject of the Constitution's preamble."²⁹⁵

There are no doubt other examples of the redemptive mode of constitutional argument, and we should not expect that they will necessarily all occupy the leftward end of the political spectrum.²⁹⁶

²⁸⁹ See Siegel, *supra* note 150, at 1045 ("For nineteenth-century Americans, voting was the central question of women's citizenship—the woman question. Nineteenth-century Americans knew what woman's suffrage signified, even if its full significance to them is no longer legible to us today.").

²⁹⁰ Siegel assumes, therefore, that historical constitutional thinking is always a project of reconfiguring "We the People" today: "It is through the past that we make pragmatic judgments about the ways we can best realize constitutional commitments and values in the present, and by appeal to the past that we know ourselves as a collective subject acting in history, united imaginatively and ethically across generations as well as communities." *Id.* at 1032.

²⁹¹ *Id.* at 961, 1043 (discussing the centrality of "the history of women's treatment in the American legal system").

²⁹² *Id.* at 1043 (referring to *United States v. Virginia*, 518 U.S. 515, 558 (1996)).

²⁹³ *Id.* at 1031. Thus she writes: "Knowing this constitutional history does not compel a particular outcome in the Morrison case, but it surely ought to inform the way we reason about the constitutional questions *Morrison* presents." *Id.*

²⁹⁴ *Id.* at 1046.

²⁹⁵ *Id.*

²⁹⁶ Examples from the other end of the political spectrum are, however, harder to come by. One might be "abortion abolitionists," the self-styled radical fringe of the anti-abortion movement. They seek to mobilize the symbolic capital of the anti-slavery movement, for

These examples help demonstrate the redemptive mode in practice, and its qualities of criticality, presentism, and disproportionate concern with constitutional failures over constitutional successes. They also help us understand what kind of thinking and action redemptive constitutional arguments enable. Redemptivism promises us improved powers of perception, to see clearly new possibilities for happiness and danger in the present. It unsettles us and allows new narratives of the past and present to emerge. Redemptive arguments also help dismantle authoritative claims that sap the vitality of the present. They present the past as ours to use, and use it to take apart triumphalist historicist and progressive narratives that serve to justify the status quo.

Does redemptivism hold its own dangers? Is it compatible not just with historical thinking, but also with law? It is to these final questions that I now turn.

CONCLUSION: NECESSARY REDEMPTION

In the preceding pages, I have argued that each of Benjamin's categories of historical methodology is at work in contemporary constitutional discourse. Our constitutional order is dominated by the approaches toward history that Benjamin calls historicism and progressivism. Constitutional historicism aspires to definitive historical interpretations, and asserts, usually via the fiction of collective consent, that history itself has constitutional authority. Its problem is two-fold: Historical narratives are neither scientific nor definitive in nature, and no history is in itself authoritative, even in constitutional context. Claims of constitutional authority are always interpretive acts. Historicism disavows this, denying its own responsibility for the decisions it takes, and the agency of the *Jetztzeit*, in the process.

example, by analogizing between the legal personhood of slaves and the legal personhood of fetuses. They are also dedicated revisiting a constitutional consensus (*Roe v. Wade*) in their own attempt to undo what they consider to be an ongoing constitutional tragedy. See, e.g., Charles Colson, *Staying Power: Abortion Battle May be Won Later Rather than Sooner*, available at <http://www.euthanasia.com/slavery.html>. They are also eclectic in the sources that they draw upon, focusing less on the legal canon than upon sources with high symbolic salience, including the international criminal trials at Nuremberg. See *Horsley v. Feldt*, 304 F.3d 1125, 1129-30 (11th Cir. 2002) (discussing the controversy over the "Nuremberg Files" website that included photographs of doctors who provided abortions). Another recent movement associated with the rightward end of the political spectrum, the attempt to reclaim the individual rights aspect of the Second Amendment. See, e.g., Randy E. Barnett & Don B. Kates, *Under Fire: The New Consensus on the Second Amendment*, 45 EMORY L.J. 1139 (1996), may have some redemptive aspects, but has been, for the most part, thoroughly historicist in its approach. See Saul Cornell, *Commonplace or Anachronism: the Standard Model, the Second Amendment, and the Problem of History in Contemporary Constitutional Theory*, 16 CONST. COMM. 221, 221-22 (1999).

Historicism also threatens to reiterate our past of constitutional exclusion into the present, because it sharply limits its field of vision to those aspects of the past that appear to generate definitive and authoritative histories. Historicists rely disproportionately upon sources that can be readily accessed and summarized, without regard for whether these sources best represent the views of the People from whom historicists claim to derive authority. They also elide the vast changes that have occurred over the centuries in who counts as an authorized constitutional subject, in order to claim that the turn to the past always serves the democratic present. But this claim fails when we acknowledge that there is no ahistorical identity between We the People today and We the People who made constitutional law in the past.

Those who make progressive arguments about constitutional history fall prey to a different mistake: instead of sanctifying the past as heritage, they commit themselves to a narrative of improvement that blinds them to both the threats and possibilities of today. By cutting themselves loose from the aspects of the past that appear disastrous, progressives also fail to see that some of the historical forces they think have been overcome in fact still operate. In the context of racial equality, for example, a progressive who views the legacy of slavery and Jim Crow as truly surpassed must believe that only the elimination of *de jure* and intentional discrimination was required to overcome this legacy. He or she must write off the manifold ways that racial hierarchy continues to reproduce itself. This soft focus on the evils of the past and present and the tendency to measure the People's success on average allows progressives to shut their eyes to the possibility that many of the deserving have failed to win, and will not win in the future. This threatens to make them complacent, and compromises their ability to understand and address the needs of the present.

Redemptive constitutionalism is more responsive to both the present and the past. It seeks to awaken us from the anaesthetizing narratives of tradition and advance that are promoted by historicism and progressivism. The redemptive approach to our constitutional past, unlike the historicist one, can be open to all of the past, because it does not claim for itself an absolute authority that requires it to invoke concepts like tradition and heritage. The redemptive historian approaches the Constitution with a "cautious detachment," but no more abandons the document than she abandons the past. Redemptivism openly looks to the present, which Benjamin understands as a moment of actualization, rather than of time, in order to orient its turn towards the past. It measures its success not according to notions of finality or definitiveness, but according to the degree of insight and kind of action in the present that the historical image enables. A redemptive historian insists that we cannot view history triumphantly, as if we are on an

eternal and constitutionally ordained path of progress. She is as skeptical of a belief in progress as she is of narratives of the heritage and tradition, because both assign agency to somewhere other than the *Jetztzeit*, and serve the interests of those who were victorious in the past. The redemptivist seeks to transcend tradition rather than reify it, and denies that any history ever fully exhausts the possible meanings of the past. Rather than claim authority for the past, redemptive arguments use the past to change our understanding of the present.

We can never rest assured that the evils we have known are not still with us in some new guise. The past is never fully done with us, never emptied of its capacity to newly influence the present. Thus, we must constantly engage in an attempt to make sense of history, rescuing it from a progressive will to forget. Redemptivism thus seeks to upend a persistent tendency to reduce constitutional history solely to the history of doctrine, or majoritarian traditions, and to valorize the understandings of framers over ratifiers, and ratifiers over "the People" themselves. The notion of redemption requires us to understand the Constitution as made up not just of the language and intentions of the historically dominant, but of a linguistic community. Indeed, we begin to see the Framers as having borrowed this language from the rest of us, and from those of us living in the present no less than communities of the past. Which is to say, the true task of the redemptive constitutionalist is to "read [the Constitution] that was never written."

The Constitution names "We the People," and this name also has a claim on us; it requires that we define and redefine it, never considering it fully made. The word "constitution" itself marks a paradox: It names our power both to make, or constitute, our own history, and the inescapable way that we are shaped by, or constituted by, that which comes before us.²⁹⁷ Recognizing that historicist and progressive thinking can perpetuate subordination under the guise of respecting tradition or believing in progress, the redemptive constitutionalist brushes history "against the grain."²⁹⁸

Redemptivism is subject to its own series of criticisms. According to Benjamin's own theory, it ought to welcome and cultivate these. The first challenge might be called the Cassandra problem; it arises from the moment in which Benjamin was writing. Benjamin may have been right that redemptive history was needed in the Weimar Republic, but wrong that this kind of disruptive program is useful elsewhere or at other times. Perhaps we are beyond the kind of cautionary tale that Benjamin tells. But what if we are not? Benjamin would insist that

²⁹⁷ See Hanna Fenichel Pitkin, *The Idea of a Constitution*, 37 J. LEGAL EDUC. 167, 167-68 (1987).

²⁹⁸ Walter Benjamin, *Theses on the Philosophy of History*, in ILLUMINATIONS, *supra* note 8, at 257.

only the spirit of progressivism, or a coldness of heart, could assure us that we have no need for vigilance now, that there is no one in danger today. This is particularly true if the forces responsible for injustice in the past persist and visit us in new guises. Cassandra, we might recall, was right about the doom she foretold, but cursed to be unable to persuade others to believe her.

Others will simply reject Benjamin's presentism, insisting that we do owe a duty to the hallowed past, and that we ought to preserve our great cultural treasures, rather than brush them against the grain. Benjamin would say that this view abandons the *Jetztzeit* and puts both the present and past in danger. Regarding Benjamin's focus on actuality, another might object that progressivism and historicism also allow action in the present, action that respectively soothes and waits, and defers and consolidates. Such values may have their uses, but whether we approve of them will depend upon our own judgment of the urgency of the present. That, in turn, Benjamin insists, is dependent upon our ability to awaken and shake off the quietist narratives supplied by historicism and progressivism.

The most important and obvious criticism, in the context of this Article, is the claim that redemptive history is incompatible with, or indeed antithetical to, claims to legal authority. Notably, many redemptive arguments address themselves more to constitutional politics than to constitutional courts, more to the People than to the judges. It may be that redemptivism is particularly well suited to claims made outside or alongside the judicial system, and to efforts to destabilize, rather than consolidate, legal authority. Siegel and Spaulding, however, both direct their redemptive histories in part towards courts, and seek to use their histories not just to disestablish traditional narratives, but also to create new persuasive, even authoritative (if not definitive) narratives of constitutional meaning. Can redemptive arguments rightly carry the legal authority that some seek for them?

There are good and bad reasons to question the compatibility of redemptivism with legal authority. One bad reason is that redemptive histories are not certain enough. The constitutional histories discussed here show how profoundly mobile claims of constitutional history and authority are. No history is certain, and no constitutional interpretation can escape the need to claim an authority of its own, one that is not simply borrowed from the past.

There are better reasons to question the uses of redemptivism to legal authority. Is legal authority incompatible with the particularity and disruptiveness of the redemptive mode? It is commonly said that

stability in interpretation is of paramount importance to law.²⁹⁹ This imperative is made manifest in the rule of *stare decisis*, which purports to forbid courts to revisit the past or to retell history. As the Supreme Court noted in *Planned Parenthood v. Casey*, “no judicial system could do society’s work if it eyed each issue afresh in every case that raised it.”³⁰⁰ “Indeed, the very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable.”³⁰¹ But just one year before, the Court reminded us that *stare decisis* is “not an inexorable command,” and cited thirty-three cases which it had overturned in whole or part over a twenty year period.³⁰² Instability may thus be as foundational to legal authority as its counterpart. Perhaps what is actually fundamental to law is an oscillation between the two.³⁰³ Redemptivism, then, might be one strategy to mediate this oscillation.

What of the need for consensus? Is it possible that legal authority is the achievement of the victors that Benjamin so dislikes, and that it ought to be? Perhaps, but this view is difficult to reconcile fully with our constitutional understanding. To the extent that we believe ourselves to be governed by the Constitution, we do so because we understand it to be *our* law, not simply the law of those who ruled before us. A description of law that only accounted for its force and not for its *nomos*, to invoke Robert Cover,³⁰⁴ would be a poor description of law.

Let me close by suggesting a few reasons that redemptive practice, with all of its disruptive, presentist, and foreboding sensibility, might well be not only proper, but necessary, to constitutional law and to claims of constitutional authority in the present. First, if Benjamin’s reasoning is right, redemptivism is no less suited to claims of legal authority than historicism or progressivism. As I have argued above, there is no mode of history that is certain; only modes that are less

²⁹⁹ See Kay, *supra* note 107, at 239 (internal citations omitted). Kay writes:

The idea of multiple interpretations of legal rules is plainly at war with this widely held view of the function of law because it creates uncertainty as to what the law requires and allows. Thus lawyers and judges have traditionally been much more concerned with arriving at a single valid interpretation than their literary [or, we might add, historical] counterparts.

Id.

³⁰⁰ *Planned Parenthood v. Casey*, 505 U.S. 833, 854 (1992).

³⁰¹ *Id.*

³⁰² *Payne v. Tennessee*, 501 U.S. 808, 828 (1991).

³⁰³ As Robert Post points out, “although the practice of constitutional adjudication at times may and sometimes must depart from doctrinal interpretation, it is a form of interpretation to which the practice will also inevitably return.” See Post, *supra* note 75, at 28. Post might also have framed this point in the obverse: Although *stare decisis* may and sometimes must be applied, the practice of departure from precedent will always return.

³⁰⁴ Robert Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 17-18 (1983).

willing to take responsibility for their acts of interpretation. No mode of history fully authorizes acts of constitutional interpretation. Redemptivism is unusual in its willingness to lay bare the agency involved in legal interpretation. Whether this, in turn, is compatible with law is a question that has long been debated in legal scholarship. The brief comments about *stare decisis* above are intended to foreground a certain skepticism about the claim that certainty is always more important to law than its opposite.

Second, as discussed in Part II, the fact that we have committed ourselves, and our Constitution, to dismantling certain forms of status-based exclusions from citizenship creates particular problems for attempts to elaborate the meaning of the Constitution historically. Historicism cannot solve this problem, and so pretends that it does not exist. Progressivism does the same, by presuming that our past attempts to liberate were in fact successful. If we were instead to face this problem in its starkest manifestations, we might conclude that a kind of redemptivism is necessary to our ability to reconcile the Constitution's historicity with its contemporary legitimacy.

Finally, the present day legitimacy of the Constitution surely depends at least in part on our ability to take seriously the tragedies of our constitutional past, and to capture the imagination of the present. Our capacity to be true to the historical aspect of the Constitution may also depend upon our ability to continually re-imagine our relation to the past, to draw new constellations between past and present. The redemptive mode of constitutional history holds a dynamic, creative promise, enabling us to reimagine the relation between past and present in a way that is responsive to both. Perhaps only by thinking redemptively can we the People live up to the claim that our constitutional past has upon us, without relinquishing our responsibility to chart the waters of our constitutional present.

